(9)

No. 97-934-CFX Title: George V. Voinovich, Governor of Ohio, et al., Petitioners
v.
Women's Medical Professional Corporation, et al.

Docketed:
December 5, 1997 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Dec 5 1997	Petition for writ of certiorari filed. (Response due February 3, 1998)
	Dec 5 1997	40 copies of 2 volumes of appendices to petition for a writ of certiorari filed
	Dec 18 1997	Order extending time to file response to petition until February 3, 1998.
	Dec 18 1997	This extension of time was granted by Justice Stevens.
	Jan 30 1998	Brief amicus curiae of A Majority of Members of the Ohio General Assembly filed.
	Feb 3 1998	Brief amici curiae of Arizona, et al. filed.
	Feb 3 1998	Brief of respondents Women's Medical Professional Corporation, et al. in opposition filed.
	Feb 17 1998	Reply brief of petitioners George Voinovich, et al. filed.
	Feb 18 1998	DISTRIBUTED. March 6, 1998
	Mar 16 1998	REDISTRIBUTED. March 20, 1998
	Mar 23 1998	Petition DENIED. Dissenting opinion by Justice Thomas with whom The Chief Justice and Justice Scalia join. (Detached opinion.)

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(1)

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

GEORGE VOINOVICH, et al.,

Petitioners,

v.

WOMEN'S MEDICAL PROFESSIONAL CORP., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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46 pp.

QUESTIONS PRESENTED

I.

WHETHER, IN A VAGUENESS OR SUBSTANTIVE DUE PROCESS CHALLENGE TO STATE ABORTION REGULATIONS, CLAIMANTS SEEKING TO INVALIDATE THE REGULATIONS IN ALL OF THEIR APPLICATIONS MUST ESTABLISH "NO SET OF CIRCUMSTANCES" IN WHICH THE REGULATIONS MAY PERMISSIBLY BE APPLIED OR MUST ESTABLISH THAT IN A "LARGE FRACTION" OF THEIR APPLICATIONS THE REGULATIONS WOULD BE IMPERMISSIBLE?

II.

WHETHER, ON ITS FACE, OHIO'S REGULATION OF PARTIAL-BIRTH ABORTIONS PLACES AN UNDUE BURDEN ON A WOMAN'S DUE PROCESS RIGHT TO TERMINATE A PREGNANCY?

III.

WHETHER, ON ITS FACE, OHIO'S REGULATION OF POST-VIABILITY ABORTIONS IS IMPERMISSIBLY VAGUE (BECAUSE IT REQUIRES THAT A PHYSICIAN EXERCISE "REASONABLE" MEDICAL JUDGMENT CONCERNING THE VIABILITY OF A FETUS OR THE MEDICAL NECESSITY FOR AN ABORTION) OR VIOLATES SUBSTANTIVE DUE PROCESS (BECAUSE IT CONTAINS A MATERNAL HEALTH EXCEPTION THAT REQUIRES THE RISK OF PHYSICAL INJURY)?

LIST OF PARTIES

Petitioners are George Voinovich, Governor, State of Ohio, Betty D. Montgomery, Attorney General, State of Ohio and Mathias H. Heck, Jr., Montgomery County Prosecuting Attorney.

Respondents are Women's Medical Professional Corp. and Martin Haskell, M.D.

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PETITION FOR A WRIT OF CERTIORARI

Ohio Governor George Voinovich, Ohio Attorney General Betty Montgomery, and Montgomery County, Ohio, Prosecutor, Mathias Heck, Jr., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Appendix ("A-") 1) has not yet been officially reported but soon will be. 1997 U.S. App. LEXIS 32232; 1997 FED App. 0336P. The opinion of the United States District Court for the Southern District of Ohio, Eastern Division (A-73) is reported. 911 F. Supp. 1051.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit (A-1) was entered on November 18, 1997. Jurisdiction in this Court exists under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides in pertinent part: "Nor shall any State deprive any person of life, liberty, or property without due process of law."

STATUTORY PROVISIONS INVOLVED

See Attachment to Petition.

STATEMENT

I. The Partial-Birth Abortion Procedure.

Partial-birth abortions represent a recent innovation in late-term abortion techniques. The first medical literature on the subject did not appear until 1992, when respondent Dr. Martin Haskell presented a paper entitled "Dilation and Extraction for Late Second Trimester Abortion" to the National Abortion Federation. A resident of Ohio who performs late-term abortions there, Dr. Haskell described a new method for performing abortions after the 20th week of gestation, and usually between the 20th and 24th week.

The three-day procedure works in the following manner. During the first two days, a doctor inserts laminaria into the woman's cervix to dilate it. On the third day, after the cervix has been dilated, the doctor uses forceps to grasp the leg of the fetus, then pulls the fetus feet-first into the woman's vagina. The doctor next removes the feet, legs, torso, and shoulders of the fetus from the vagina, so that only the upper part of the fetal head remains in the birth canal. At that point, as the head of the fetus remains lodged in the pregnant woman's body, the surgeon forces scissors into the base of the skull, places a suction catheter into the scissor hole and evacuates the skull contents. The suctioning of the brain is customarily what terminates the life of the fetus. To describe this novel procedure, Dr. Haskell coined the term "Dilation and Extraction" or "D&X." Dr. Haskell also explained that the D&X procedure differs from the classic dilation and evacuation (D&E) procedure because it does not rely upon dismemberment to remove the fetus from the woman's body.

The record in this case indicates that the D&X (or partial-birth) procedure is not commonly used by abortion practitioners. Indeed, the American Medical Association has

recently concluded that the partial-birth method for aborting a fetus "'is never the only appropriate procedure and has no history in peer reviewed medical literature or in accepted medical practice development.'" A-59 (Boggs, J., dissenting) (quoting AMA Board of Trustees Statement of May 19, 1997).

II. The Ohio Statutes.

In 1995, through their representatives in the legislature, the citizens of Ohio responded to the use of the D&X procedure in the State and more generally to the availability of post-viability abortions in the State. By a cumulative margin of 110-19, the Ohio General Assembly passed House Bill 135 (the "Act"), which Governor Voinovich promptly signed into law. The legislative "intent" of the bill, according to the terms of the enactment, was "to prevent the unnecessary use of a specific procedure used in performing abortions . . . based on a state interest in preventing unnecessary cruelty to the human fetus." 1995 H. 135, section 3. To that end, the law places limits on the availability of partial-birth and post-viability abortions.

A. The Restriction on Partial-Birth Abortions.

In order to "prevent[] unnecessary cruelty to the human fetus," 1995 H. 350, section 3, the statute restricts the use of the D&X procedure, which involves "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain." R.C. 2919.15(B). While the regulation applies to all abortions, whether the fetus is viable or not, it does not constitute an absolute ban. Individuals violate the restriction only when they "knowingly" perform the procedure and only when there is no medical urgency for performing it -- in other words, only when other procedures for

terminating the pregnancy would place the health of the mother at risk. R.C. 2919.15(B) & (C); R.C. 2307.51(C).

B. The Restriction on Post-Viability Abortions.

The legislation also limits the availability of abortions once the fetus has become capable of living outside the mother's womb. Under the statute, "[n]o person shall purposely perform" an abortion "if the unborn human is viable" unless one of two conditions exist. R.C. 2919.17(A). The first occurs when the abortion is performed by a physician who determines "in good faith and in the exercise of reasonable medical judgment" that the abortion is "necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman." *Id.* The second occurs when the abortion is performed by a physician who determines "in good faith and in the exercise of reasonable medical judgment" that the "unborn human is not viable." *Id.* In addition, any post-viability abortions done consistently with these requirements must also comply with several other procedural rules. *See* R.C. 2929.17(B).

For purposes of the post-viability ban, a fetus of at least 24 weeks is rebuttably presumed to be viable. R.C. 2919.17(C)(1). Once a fetus has reached 22 weeks, however, Ohio requires a physician to "perform a medical examination of the pregnant woman" to determine whether the fetus is viable, unless a medical emergency prevents such testing from being done. R.C. 2919.18(A). The statute defines "medical emergency" as a "condition that a pregnant woman's physician determines, in good faith and in the exercise of reasonable medical judgment, so complicates the woman's pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the pregnant woman or

to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman that delay in the performance or inducement of the abortion would create." R.C. 2919.16(F). In turn, R.C. 2919.16(J) defines a "serious risk of the substantial and irreversible impairment of a major bodily function" as "any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function, including, but not limited to, the following conditions: 1) pre-eclampsia; 2) inevitable abortion; 3) prematurely ruptured membrane; 4) diabetes; 5) multiple sclerosis." Attempting to ensure that the provision complied with federal law, the General Assembly directed that this definition "be construed according to the interpretation given to that phrase in *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2822 (1992), and *Planned Parenthood v. Casey*, 947 F.2d 682, 699-702 (3rd Cir. 1991)." *See* Section 4 of H.B. 135.

The Act, in each of these respects, was scheduled to take effect on November 14, 1995.

III. Procedural History

Yet, on October 27, 1995, before the legislation had a chance to go into operation, respondents filed this action, seeking both declaratory and injunctive relief. Respondents are the Women's Medical Professional Corporation, which operates clinics and provides abortion services in Ohio, and Dr. Haskell who originated the D&X abortion procedure and has used it to perform abortions between 20 and 24 weeks. Respondents claimed that the Act was unconstitutional on its face under two primary theories. They asserted that the partial-birth regulation imposes undue burdens on a woman's right to

terminate a pregnancy under the due process clause. And they claimed that the Act's post-viability regulations are impermissible vague and also violate substantive due process.

The district court (Rice, J.) granted respondents' request to restrain the Act from going into effect. He then entered a preliminary, and later a permanent, injunction prohibiting the entire Act from becoming law. The State appealed.

IV. The Sixth Circuit's Decision.

In a 2-1 decision (Brown, *Kennedy*, *Boggs* (dissent)), the Sixth Circuit affirmed.

A. Standard For Assessing Facial, Pre-Implementation Challenge.

In addressing the appropriate standard for reviewing a facial challenge to a statute, the court forthrightly acknowledged a cloud of uncertainty on the issue. On the one hand, the Sixth Circuit observed, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), struck a spousal notification provision in the context of a facial challenge because the record showed that "in a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." A-12 (quoting *Casey*, 505 U.S. at 895). Yet in several other abortion decisions, the Sixth Circuit observed, the Court has applied the stringent *Salerno* test for assessing a facial challenge, requiring the complainant to "establish that no set of circumstances exists under which the Act would be valid." A-12 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (citing *Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Ohio v. Akron Ctr. For Reprod. Health*, 497 U.S. 502, 514 (1990)).

In the end the Sixth Circuit applied the less stringent standard, concluding that the traditional test for assessing an across-the-board challenge to a statute does not apply. "Although *Casey* does not expressly purport to overrule *Salerno*," the lower court held (A-12), "in effect it does." The court also applied this standard (A-18 to A-19, A-39 n.18) in assessing respondents' vagueness challenge.

B. Invalidation of Ohio's Partial-Birth (D&X) Regulation.

Applying this standard, the Sixth Circuit concluded that Ohio's regulation of partial-birth abortions imposes an undue burden on a woman's right to terminate a pregnancy. A-28-29, 32. The central flaw in the restriction, from the court's perspective, was definitional, namely that the statute's description of the restricted procedure covers "the most commonly used second trimester procedure," the D&E procedure. A-29. Because Ohio defines the restricted procedure to involve "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain," R.C. 2919.15(A), and because "some physicians" implement the D&E procedure by "using suction to remove the intracranial contents" of a dismembered fetus, the court concluded that the definition applies equally to both types of abortion procedures. A-22, A-33. The overlap, the court determined, places an undue burden on a woman's right to terminate her pregnancy because the law limits the availability of the most common method of second trimester abortion. A-28. Finally, the court chose not to apply its ruling exclusivly to pre-viability abortions. Taking the view that Ohio's regulation of partial-birth abortions does not distinguish between pre- and post-viability abortions, it concluded that it "essentially would have to rewrite the Act in order to create a provision which could stand by itself." A-32.

C. Invalidation of Ohio's Restriction on Post-Viability Abortions.

The court next determined that the medical necessity and medical emergency exceptions to the ban on post-viability abortions (which require the physician to determine "in good faith and in the exercise of reasonable medical judgment" that the exception exists) were unconstitutionally vague because they lacked an appropriate *mens rea* requirement. A-34. What troubled the court was that other physicians could determine "after the fact" that the performing doctor's medical judgment was not reasonable, and therefore doctors could be held liable even when they acted in good faith and according to their own best medical judgment. A-35.

Lastly, the court invalidated the maternal health exception because it concluded that it applies only to physical, and not mental, health risks. Though agreeing that *Casey* "does suggest" a maternal health exception limited to physicial health exceptions "is constitutional," A-42, it found *Casey* distinguishable because it involved a regulation that "only delayed abortions" while the Ohio regulation "bans post-viability abortions." A-44.

D. The Dissent.

Judge Boggs disagreed with the majority's conclusion that the entire Act offends due process. As a general matter, rather than "interpret[ing] statutes so as to avoid difficult constitutional questions," he complained that "the majority's opinion strains to interpret Ohio's partial-birth abortion statute so as to make the burden imposed by Ohio's ban on dilation-and-extraction ("D&X") abortions, and on most post-viability

abortions, appear 'undue.'" A-53-54. He also disagreed with his colleagues' extension of the overbreadth doctrine from the First Amendment into the area of vagueness and substantive due process challenges. A-67-68.

Moving from the general to the specific, Judge Boggs took issue with the majority's invalidation of the D&X regulation. In his view, "plaintiffs are attempting to create ambiguity where there is none," as shown by their refusal at oral argument to "be pinned down as to any set of words that would . . . acceptably define the procedure." A-59-60. Instead, the dissent remarked, Ohio had authority to regulate such an unusual procedure, particularly since the American Medical Assocation has concluded that it "'is never the only appropriate procedure and has no history in peer reviewed medical literature or in accepted medical practice development.'" A-59 (quoting AMA Board of Trustees Statement of May 19, 1997). Nor did the statute, in the dissent's view, fail to put doctors on "fair notice as to what is encompassed by the ban," above all because the D&E procedure "does not terminate the pregnancy by purposely inserting a suction device into the fetal skull," but is "only a byproduct of the abortion procedure already performed" and because "[t]he testimony at the hearing in the district court clearly demonstrates that doctors who perform abortions have no difficulty discerning the conduct prohibited by the statute." A-61. At any rate, even if there were ambiguity in the statute, he said, the court should have invoked the rule of lenity to resolve it. A-60 n.2.

Judge Boggs also did not think that Ohio's restriction on post-viability abortions was impermissibly vague. The lack of a scienter requirement for the "medical necessity" and "medical emergency" provisions, or for that matter any penal statute, the dissent urged, does not render a statute unconstitutionally vague. A-62. Even *Casey* recognized that the "life or health of the mother" exception may be invoked only when necessary "in

appropriate medical judgment." A-63 (quoting *Casey*, 505 U.S. at 879). And "[i]t is difficult to see how a medical judgment can be deemed 'appropriate' if it is, beyond a reasonable doubt, not a reasonable judgment." A-63.

On the question whether the post-viability ban must accommodate non-physical factors, Judge Boggs believed that the legislature's instruction to construe the medical necessity or emergency instructions in line with *Casey* revealed an earnest (and, he thought, accurate) attempt to comply with the Constitution. A-65. At any rate, he also concluded that the majority's requirement that such a law must encompass "severe risks of mental and emotional harm" was in fact met by the "broad" language used by the legislature concerning the "impairment of a major bodily function." A-65.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Decision Exacerbates Several Conflicts Of Authority.

The first reason for reviewing the Sixth Circuit's decision is the burgeoning conflict of authority on the appropriate standard for assessing a pre-implementation facial challenge to an abortion regulation. The initial point of disagreement stems from Supreme Court precedent. Not just *Salerno*, but several abortion decisions as well, *see Rust v. Sullivan*, 500 U.S. 173, 183 (1991), *Ohio v. Akron Ctr. For Reprod. Health*, 497 U.S. 502, 514 (1990), *see also Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (O'Connor, J., concurring in part and concurring in the judgment), have applied a "no set of circumstances" test in assessing facial challenges to a statute. By contrast, *Casey* appears to permit

relief in such challenges so long as the claimant shows that the statute creates an undue burden on the right to terminate a pregnancy in a "large fraction" of the statute's applications. 505 U.S. at 895.

In the aftermath of *Casey*, several Justices have written separately to express their views on this precedential tension, some agreeing with the *Salerno/Rust/Akron Ctr.* characterization of the standard, others agreeing with the *Casey* characterization of the standard. Compare *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 116 S. Ct. 1582, 1583 (1996) (concluding that "*Salerno*'s rigid and unwise *dictum* has been properly ignored in subsequent cases") (Stevens, J., concurring in denial of certiorari), with *id.* at 1584-85 (*Casey* "did not purport to change this well-established rule") (quotation omitted) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from denial of certiorari), and *Ada v. Guam Society of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., joined by Rehnquist, C.J., and White, J., dissenting from denial of certiorari).

The federal courts of appeals likewise have not been of one mind in determining whether *Casey* modifies the *Salerno/Rust/Akron Ctr.* standard. On one side of the conflict, three courts of appeals have agreed with the Sixth Circuit's conclusion that *Casey* effectively overrules *Salerno*. *See Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 2453 (1997); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1582 (1996); *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 14 F.3d 848, 863 n.21 (3d Cir. 1994) (*dicta*).

In contrast to these appellate courts, the Fifth Circuit has concluded that *Casey* did not overrule the traditional rule for assessing facial challenges. *See Barnes v. Moore*, 970 F.2d

12, 14 n.2 (5th Cir.) ("we do not interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes"), *cert. denied*, 506 U.S. 1021 (1992); *accord Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1102-04 (5th Cir. 1997) ("As far as we can tell, the Court appears to be divided 3-3 on the *Salerno-Casey* debate, and it would be ill-advised for us to *assume* that the Court will abandon *Salerno* because three members of the Court now desire that result"), *cert. denied*, 118 S. Ct. 357 (1997). Still another court of appeals, the Fourth Circuit, appears to be leaning toward the traditional rule, but has not yet had an opportunity so to hold. *See Manning v. Hunt*, 119 F.3d 254, 268-69, n.4 (4th Cir. 1997) ("the reasoning of the Fifth Circuit [regarding this lower-court conflict of authority] appears to be most persuasive").

Whether the reader is partial to one side of this debate or the other, it is difficult to avoid the conclusion that the question "cries out for [the Court's] review." *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 116 S. Ct. 1582, 1584 (1996) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from denial of certiorari). Nor can there be any doubt that this case squarely presents the issue, as the district court admitted that plaintiffs had "not shown that 'no set of circumstances' exists under which the ban would be valid." A-91.

On top of the *Salerno/Casey* division of authority presented by this case rests another split, which the Sixth Circuit has now deepened as well. In assessing facial attacks on allegedly vague statutes, courts have generally applied the traditional *Salerno* rule, which is to say they will reject the challenge unless the enactment is "impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). The Sixth Circuit, however, took a different tack in assessing claimants'

vagueness challenge to the restriction on post-viability abortions. "Since we have already held that *Salerno* does not apply in the abortion context," the court held, "it is enough that the statute may be unconstitutionally applied to a large fraction of women for whom the law is relevant." A-39-40 n.18.

Right or wrong, this interpretation extends the *Casey* overbreadth standard to an area of abortion regulations not even subject to undue-burden review (post-viability regulations) and applies the principle to a new constititutional claim (vagueness). In addition to *Hoffman Estates*, this analysis diverges from several other Supreme Court precedents. *See, e.g., Chapman v. United States*, 500 U.S. 453, 467 (1991) ("vagueness claims must be evaluated as the statute is applied to the facts of [the] case" when "First Amendment freedoms are not infringed by the statute"); *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988); *United States v. Powell*, 423 U.S. 87, 92 (1975); *United States v. Mazurie*, 419 U.S. 544, 550 (1975). To be fair, however, two precedents from this Court provide ostensible support for this analysis. In contrast to the *Hoffman Estates/Salerno* rule, some cases seem to apply an overbreadth analysis whenever there is any "constitutionally protected conduct" at issue. *See Kolender v. Lawson*, 461 U.S. 352, 358-59 n.8 (1983); *Colautti*, 439 U.S. at 394-401. Of course, this approach directly conflicts with *Hoffman Estates*, as the Sixth Circuit itself admitted in grappling with the question. *See* A-19 ("At times the Court has suggested that a statute that does not run the risk of chilling constitutional freedoms is void on its face only if it is impermissibly vague in all its applications, but at other times it has suggested that a criminal statute may be facially invalid even if it has some conceivable application").

In addition, several circuits courts have applied a different standard of review from the one applied by the Sixth Circuit, some going so far as to suggest that a facial vagueness

claim may never be brought. *See, e.g., United States v. Reed*, 114 F.3d 1067, 1070 (10th Cir. 1997) ("[a] vagueness challenge . . . cannot be aimed at the statute on its face but must be limited to the application of the statute to the particular conduct charged"); *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 684 (2d Cir. 1996) (plaintiffs can only succeed "on a facial vagueness challenge if they could show that the law is impermissibly vague in all of its applications") (quotation omitted); *United States v. A Single Family Residence*, 803 F.2d 625, 630 (11th Cir. 1986) (a facial challenge on vagueness grounds "is a claim that the law is invalid in toto -- and therefore incapable of any valid application") (internal quotation omitted); *Stoianoff v. Montana*, 695 F.2d 1214, 1220 (9th Cir. 1983) ("All that we must find to sustain the facial constitutionality of the Act is a single clear application of the Act to the appellant"). *Cf. New England Accessories Trade Assn, Inc. v. City of Nashua*, 679 F.2d 1, 5 (1st Cir. 1982) ("unless the enactment implicates constitutionally protected conduct, we can invalidate it only if it is impermissibly vague in all of its applications").

The Sixth Circuit's invalidation of the partial-birth and post-viability abortion regulations also conflicts with this Court's landmark decision in *Casey*. *See infra*. While this conflict has not yet spread to the lower courts, that fact surely does not diminish the certworthiness of at least the first question presented and in our view the appropriateness of promptly reviewing all three questions.

Perhaps the most important question in the petition -- the proper constitutional standard for assessing these types of challenges -- is the one that has most deeply divided the lower courts and has done all the percolating that any legal issue needs to become ripe for review. In view of the sizeable number of partial-birth abortion regulations being challenged throughout the country, *see infra*, and in view of the standard

of review's impact on those claims, it would seem odd to continue to force the lower courts to issue rulings in these cases in the absence of much-needed guidance from the Court on this vital point. In the last analysis, the first question presented calls out for immediate review in light of the substantial conflict of authority over its resolution; and the second and third questions merit prompt review to place the standard-of-review issue in context and resolve the tension between the Sixth Circuit's merits decision and *Casey*.

II. The Sixth Circuit's Decision Raises Important Federal Questions.

Even aside from the conflicts of authority implicated by the petition, the significance of the questions presented in and of itself warrants review. By any relevant standard, the constitutionality of legislation restricting partial-birth and post-viability abortions, to say nothing of the standard for assessing such laws, presents important, indeed exceedingly important, federal questions. The Court has not yet considered the validity of limitations on partial-birth abortions. Nor has it determined whether a mental health exception is constitutionally required when it comes to restrictions on post-viability abortions. And, for five years now, the lower courts have remained in limbo over the appropriate standard for reviewing these claims. Add to this the fact that Ohioans are far from the only interested participants in these debates, and it becomes clear that the petition presents several certworthy federal questions.

In enacting these laws, Ohio joined a legion of other States that have regulated one or the other of these procedures, and sometimes both. All told, 17 States (including Ohio) regulate partial-birth abortions. *See* 1997 Ala. Acts 485; Alaska Stat. 18.16.050; Ariz. Rev. Stat. Ann. 13-3603.01; 1997 Ark. Acts 984; Ga Code Ann. 16-12-144; Ind. Code Ann. 16-18-2-267.5, 16-34-2-1(b); 1997 La. Acts 906, La. R.S. 14:32:9

and 40:1299.35.3; Mich. Comp. Laws Ann. 333.16221(l) & (m), 333.16226, 333.17016, 333.17516; Miss. Code Ann. 41-41-73; Mont. Code Ann. 50-20-401; Neb. Rev. Stat. 28-325, 28-326(9) & 71-148; R.I. Gen. Laws 23-4.12-1, 23-4.12-2, 23-4.12-3, 23-4.12-4, 23-4.12-5 and 23-4.12-6; S.C. Code Ann. 44-41-85; S.D. Codified Laws 34-23A-27 through 34-23A-32; Tenn. Code Ann. 39-15-209; Utah Code Ann. 76-7.310.5.

In addition, a host of States (again including Ohio) and the District of Columbia regulate post-viability abortions. Of these laws, three contain maternal health exceptions that parallel Ohio's. *See* 1997 Ala. Acts 442; Ind. Stat. Ann. 16-34-2-1(3) and 16-34-2-3; 18 Pa. C.S.A. 3211. Several of the statutes contain maternal health exceptions, yet do not define "health." *See* Ariz. Rev. Stat. Ann. 36-2301.01(A); Ark. Code Ann. 20-16-705; Cal. Health and Safety Code 123405, 123410, 123415, 123435; Conn. Gen. Stat. Ann. 19a-602(b); D.C. Code 22-201; Fla. Stat. Ann. 390.0111(1) & (4); Ga. Code Ann. 16-12-141(C); Ill. Comp. Stat. Ann., Ch. 720, 510/5; Iowa Code Ann. 707.7; Ky. Rev. Stat. Ann. 311.780; La. Stat. Ann. 1299.35.4; Maine Rev. Stat. Ann. Title 22, 1598; Minn. Stat. Ann. 145.412(3); Mo. Stat. Ann. 188.030(1); Mont. Code Ann. 50-20-109(c); Neb. Rev. Stat. 28-329; N.C. Gen. Stat. 14-45.1; Okla. Stat. Ann. 1-732; S.D. Cod. Laws 34-23A-5; Tenn. Code Ann. 39-15-201(C)(3); Wis Stat. Ann. 940.15; Wyo. Stat. 35-6-102. And several of the statutes contain a "life of the mother" exception. *See* Del. Code Ann., Title 24, 1790(a)(1) & (b)(1); Idaho Code Ann. 18-608(3); Kansas Stat. Ann. 65-6-703; New York Pen. Law 125.00, 125.05, 125.45; R.I. Gen. Laws Ann. 11-23-5.

It ought to be enough to show the substance of a constitutional question that the decision below nullifies the democratic efforts of an overwhelming majority of Ohioans to express their collective concerns about partial-birth and post-viability abortions. But here there is more. Sixteen other States

have enacted partial-birth abortion laws, with most of them already under judicial attack, and all of them vulnerable under the analysis adopted by the Sixth Circuit. Similar problems plague the other State laws that limit post-viability abortions and employ the *Casey*-approved "substantial and irreversible impairment of a major bodily function" language to protect the pregnant woman's health. Moreover, the multitude of States that have enacted post-viability laws -- including those that do not contain explicit mental health exceptions for the mother -- need this Court's guidance on the meaning of the required "health" exception in the context of a ban on post-viability abortions.

Nor has the medical community had insufficient time to study these issues. The American Medical Association, for example, recently took a vigorous public stand against use of the partial-birth procedure, and in doing so advocated a federal ban on partial-birth abortions. Its Board of Trustees issued a statement explaining that it "is a procedure which is never the only appropriate procedure and has no history in peer reviewed medical literature or in accepted medical practice development." A-59. The position later received the endorsement of the entire AMA House of Delegates. *Id.*

A final word deserves consideration. The Court has said that the States have an interest in the potential life that comes with all pregnancies, and a special right to safeguard that interest once the prospects for life outside the womb move from hope to relative certainty. At the same time, the Court has made clear that the States must honor a woman's right to terminate a pregnancy pre-viability and must not shortchange her health interests when restricting abortions after viability. A law designed to regulate an abortion procedure that to many seems gratuitously cruel and offensive, or one that limits the availability of any procedure once a fetus has developed to the point where it can become a child by the act of delivery, surely

advances these interests, and does so in a way that respects due process. But whether we are right or wrong at this stage is (at least partly) beside the point: The critical issue is that no one can tenably dispute that these issues have irreversible consequences for women and potential children, and those consequences ought to satisfy any and all calibrations of federal importance.

III. The Sixth Circuit Erred In Striking The Ohio Law.

The Sixth Circuit, we believe, also erred in invalidating the Act in its entirety. This, too, favors review.

A. The Court of Appeals Applied The Wrong Standard For Assessing Facial Challenges to an Abortion Statute.

Undue burden. In assessing the appropriate standard for reviewing an undue burden challenge to a partial-birth abortion regulation, the Sixth Circuit overlooked the core premise for distinguishing between facial and as-applied challenges. Federal courts have a duty to try to save, not destroy, State legislation. *Planned Parenthood Assn. of Kansas City v. Ashcroft*, 462 U.S. 476, 493 (1983); *see also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 647 (1990). And a standard of review that allows entire statutes to be nullified before the State has had a chance to implement them and before the presumption of constitutionality has been countered with respect to each prospective application of the statute turns the passive virtue of this age-old limitation on judicial review into an active vice. Outside the context of the First Amendment where litigants may overcome the presumption of constitutionality of an entire statute by demonstrating substantial problems in its application, the Court has long held

that a facial challenge may succeed only after the claimants have met their burden of showing "no set of circumstances" in which the law may be constitutionally applied. *Salerno*, 481 U.S. at 745.

Nor is it clear why this "traditional rule" (*New York v. Ferber*, 458 U.S. 747, 767 (1982)) ought suddenly to be interred. No studies have been done showing that the rule leads to unfair consequences. Nor have any great hardships arisen through the Court's frequent application of the rule in the abortion context, *see Rust v. Sullivan*, 500 U.S. 173, 183 (1991), *Ohio v. Akron Ctr. For Reprod.Health*, 497 U.S. 502, 514 (1990), *see also Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in the judgment), and in other settings, *see Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995), *Reno v. Flores*, 507 U.S. 292, 301, 309 (1993), *cf. Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2355 (1997) (O'Connor, J., concurring in part and dissenting in part, joined by Rehnquist, C.J.). The distinction between facial and as-applied challenges is as time honored as it is widespread, and ultimately reflects the benefit of the doubt that federal courts customarily give State officials, namely that they presumably will obey, not offend, their duty to uphold the Constitution in implementing a statute. For the same reason, the Court has resisted invitations to invalidate statutes based upon a "hypothetical possibility" of unconstitutional application in the future. *General Motors v. Tracy*, 117 S. Ct. 811, 830 (1997); *Bowen v. Kendrick*, 487 U.S. 589, 601 (1988); *Roemer v. Bd. of Public Works*, 426 U.S. 736, 760-61 (1976).

Even on the facts of this case, it remains unclear what harm the traditional rule would engender. In the court of appeals' view, the State's definition of a partial-birth abortion impermissibly covered the more traditional D&E procedure. Taking that for granted, who suffers if the court identifies this

constitutional defect, then rejects the facial challenge on the ground that the flaw does not infect the entire statute -- for example, because the statute still may be applied to the D&X procedure itself or to the D&E procedure in the context of post-viability abortions? What State would not get the message? Surely no State would start regulating pre-viability D&E abortions after such a decision, least of all Ohio, which had no intention of banning this customary procedure in the first place, which would have no objection to a limiting interpretation of the law, and whose Attorney General has never suggested that the statute may be construed in this unusual way. What is more, State officials who continued to apply the statute in unconstitutional ways would soon feel the deterrent sting of section 1988 attorney fees, not to mention civil rights actions brought against the officials in their individual capacity and with little likelihood of a qualified immunity shield.

Nor, for like reasons, will this approach imperil the availability of constitutionally-permitted abortions. If anything, these considerations will likely prompt State officials to under-enforce, not over-enforce, laws that have been invalidated in certain applications. But either way, wary physicians may still bring declaratory judgment actions to determine whether the law applies in a given setting and if so whether that application withstands constitutional scrutiny. Or, if worst comes to worst, they may still bring an as-applied challenge to the law if it is unfairly used against them, at which time the rule of lenity will govern (and limit) any ambiguous applications of the law.

That leaves the Court's decision in *Casey*, which as interpreted by the court of appeals silently abandoned not just *Salerno* but a long tradition of decisions requiring claimants to establish no set of circumstances in which the law may

permissibly be applied before striking the provision in its entirety. No doubt, as the courts of appeals and several members of this Court have recognized, there seems to be tension between the two cases, at least at first blush.

But, in truth, *Casey* and *Salerno* are compatible. The traditional *Salerno* requirement has long been met when a statute "operates on a fundamentally mistaken premise." *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 966 (1984). Just such a "mistaken premise" infected the spousal-notification provision in *Casey*: The requirement that a woman notify her husband before seeking an abortion rested on the flawed assumption that "a husband's interest in the potential life of the [unborn] child outweighs a wife's interest [to choose to have an abortion]." *Casey*, 505 U.S. at 898. Because the whole spousal-notification provision rested on this mistaken premise, the statute was indeed unconstitutional in all of its applications. The *Munson* principle thus reconciles *Casey* and *Salerno*.

Vagueness. No less erroneous was the court of appeals' extension of its *Casey* interpretation to facial vagueness claims. Of course, *Casey* was not a vagueness case. And, in the Court's vagueness decisions, it has followed an essentially unbroken tradition in concluding that such challenges cannot succeed unless the enactment is "impermissibly vague in all of its applications." *Village of Hoffman Estates*, 455 U.S. at 495. Unless the legislation is so vague as to "proscribe[] no comprehensible course of conduct at all," *Powell*, 423 U.S. at 92, which plainly was not the case with Ohio's requirement that the physician act in good faith and exercise reasonable medical judgment in determining viability or medical necessity, the traditional test applies. *See Chapman*, 500 U.S. at 467; *Maynard*, 486 U.S. at 361; *Powell*, 423 U.S. at 92; *Mazurie*, 419 U.S. at 550.

True, some cases have loosely suggested that the overbreadth rule applies when the statute implicates "constitutional," as distinct from First Amendment, freedoms. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 358-59 (1983). But virtually all of these cases, including *Kolender* itself, involved First Amendment rights, suggesting that the term "constitutional" was simply shorthand for First Amendment rights. The one exception is *Colautti v. Franklin*, a pre-*Casey* abortion decision whose broad sweep has since been questioned by several members of the Court. *See Webster*, 492 U.S. 490 (opinion of Rehnquist, C.J., joined by White, J., and Kennedy, J.)

B. The Court of Appeals Erred in Striking Ohio's Partial-Birth (D&X) Abortion Regulation.

In addition to applying the wrong standard of review, the court of appeals committed reversible error in finding that Ohio's regulation of partial-birth abortions unduly burdens a woman's right to terminate a pregnancy. The court did not rule, as indeed it could not have ruled, that the Constitution forbids States from restricting the availability of this unusual procedure. Instead, the court construed Ohio's definition of the D&X procedure to encompass the more common (and constitutionally legitimate) D&E procedure. But the Act simply cannot sustain this analysis, as it contains a series of unmistakeable inferences (if not outright directions) that the statute bans the one procedure but not the other.

First, two of the statutes created by the Act label the proscribed procedure in no uncertain terms, one titled "Dilation and Extraction Procedure," 2919.15, the other titled "Civil

Action for Dilation and Extraction Procedure," 2307.51. The relevant text of the statutes proceeds to identify the D&X procedure by name more than a dozen times, while the D&E procedure is nowhere mentioned and nowhere banned.

Second, by its terms, Ohio's definition of the D&X procedure cannot plausibly cover the distinct D&E procedure. The statute describes the D&X procedure as covering (1) "the termination of a human pregnancy" by (2) "purposely inserting a suction device into the skull of a fetus to remove the brain." Yet the late-term D&E procedure does not end a pregnancy by using a suction device; it ends the pregnancy by dismembering the fetus and then using a suction device to remove the scattered remains. Nor does the D&E procedure involve a "purpose[ful]" insertion of a suction device into the fetal skull. It involves dismemberment of the fetus followed by anything but purposeful suctioning of the fetal remains. The D&X procedure, by contrast, is designed precisely to deliver most of the body of the fetus in order to have access to the head so that the physician may "purposely" insert a suction device into the brain.

Third, the goal of the statute removes any doubt as to what was proscribed: The legislators designed the D&X regulation "to prevent the *unnecessary* use of *a specific procedure* used in performing abortions . . . based on a state interest in preventing unnecessary cruelty to the human fetus." 1995 H. 350, section 3 (emphasis added). The D&X procedure plainly is "unnecessary," as suggested by its infrequent use, its undistinguished pedigree, and its disapproval by the AMA. Yet the D&E *is* constitutionally necessary because (as the court of appeals itself found) it is the most common form of second trimester abortion. And a regulation concerning "*a* specific procedure" surely means just one procedure, not two, and most assuredly the one repeatedly mentioned by name throughout the Act. Finally, and perhaps most paradoxically, the very person

who challenges the overlap between the D&E and D&X procedures, respondent Dr. Haskell, is precisely the person who coined the term D&X in order to distinguish between the two procedures. In using Dr. Haskell's definition, Ohio came closer to establishing a bill of attainder (a law that suffers from too much specificity) than to establishing an overly-broad statute that unduly burdens a woman's due process rights.

But even if each of these pieces of statutory and record evidence do not support the Ohio Attorney General's, the Ohio Governor's, and the relevant Ohio County Prosecutor's interpretation of the statute, which is that the law does not restrict D&E abortions, the most one can say is that the statute is ambiguous. Yet under those circumstances, the court's job is not to invalidate the law, but to adopt the narrower interpretation of it under the rule of lenity. *United States v. R.L.C.*, 503 U.S. 291, 305-13 (1992).

C. The Court of Appeals Erred in Concluding that the Good-Faith and Reasonable-Medical-Judgment Exceptions to the Post-Viability Ban Were Impermissibly Vague.

The court of appeals also erred in reviewing Ohio's requirement that physicians act in good faith and exercise reasonable medical judgment in determining the viability of a fetus and in making a finding of medical necessity before aborting a fetus who could live outside the womb. In concluding that these provisions were impermissibly vague, the court focused on the fact that they did not have a *mens rea* requirement.

First, and most conspicuously, the statute *does* contain a *mens rea* requirement. Section 2919.17 explicitly provides that one must act "purposely" in order to break the law. This

fact by itself distinguishes the Ohio law from the one at issue in *Colautti v. Franklin*, 439 U.S. 379 (1979), which lacked any state-of-mind element. *Id.* at 381 n.1.

But, second, even if the statute lacked a *mens rea* requirement (which it does not), that alone does not render a law unconstitutionally vague. Laws frequently proscribe unreasonable conduct, and permissibly so. "The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." *United States v. Ragen*, 314 U.S. 513, 523 (1942). Nor in a criminal setting is unreasonableness by itself enough to obtain a conviction; the jury must find that the individual's medical judgment was unreasonable "beyond a reasonable doubt," a daunting standard for any prosecutor to meet. Even *Casey* recognized that the "life or health of the mother" exception may be invoked only when necessary "in appropriate medical judgment," *Casey*, 505 U.S. at 879, a similar standard of care but one that is necessary if laws of this sort are to have any effect.

Nor does the pre-*Casey* decision in *Colautti v. Franklin*, 439 U.S. 379 (1979), support the lower court decision. *Colautti* specifically reserved the question whether "under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability." *Id.* at 396.

Finally, it seems unfair to criticize States for using unreasonable medical judgment as a touchstone for liability in this area. The Court's judgments about State regulations in this setting after all each turn on reasonableness balancing, what necessarily comes down to difficult distinctions between "undue" burdens on a women's ability to terminate a pregnancy

and permissible burdens on that right prompted by the State's interest in protecting potential life. When States follow suit in earnestly trying to regulate in a constitutional manner in this area, it is not because they are trying to trap the unwary. It is because clear lines are hard to find and because the price for complete certainty is invariably overprotection of one of these interests and neglect for the other.

D. The Court of Appeals Erred In Concluding That the Ohio Post-Viability Abortion Regulations Violate Substantive Due Process Because They Do Not Contain a Mental Health Exception For the Mother.

The final error committed by the court of appeals stems from its review of Ohio's maternal health exception to the ban on post-viability abortions. In holding that such exceptions must cover the mental health of the woman in order to comply with substantive due process, the court not only made new law but also failed to follow several pertinent teachings of *Casey*.

Casey specifically upheld a maternal health exception to an abortion regulation that was substantively identical to Ohio's, and indeed was the source for it. *See* 505 U.S. at 879-81. By upholding the Pennsylvania formulation of the maternal-health exception ("substantial and irreversible impairment of a major bodily function"), the Court plainly was blessing an identically-worded provision for exempting women from other abortion regulations. In order to remove any doubt on this score, the Ohio legislature expressly provided in the terms of the Act that it wanted the phrase to obtain the same construction as the Pennsylvania statute. In using the phrase "serious risk of the substantial and irreversible impairment of a major bodily function," "it is the intent of the General

Assembly that the phrase be construed according to the interpretation given to that phrase in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2822 (1992), and *Planned Parenthood v.* Casey, 947 F.2d 682, 699-702 (3d Cir. 1991)." H. 135, section 4, 121st Gen. Ass. (Ohio 1995). What more, in short, could the State have done to ensure that it was acting constitutionally in this area?

Nor does *Doe v. Bolton*, 410 U.S. 179 (1973), another pre-*Casey* decision relied upon by the court of appeals, change matters. *Doe* addressed a statute that barred abortions unless a doctor determined "an abortion is necessary." *Id.* at 183. In doing so, it rejected a vagueness challenge to the law because the broad wording of the statute expanded the choices of pregnant women by authorizing an abortion for a whole host of reasons, including emotional health. That conclusion has little application here.

In the last analysis, the court of appeal's mistaken application of this Court's precedents also supports the writ.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to grant the writ.

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ATTACHMENT -- OHIO STATUTORY PROVISIONS

2919.15 Dilation and extraction procedure

(A) As used in this section, "dilation and extraction procedure" means the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain. "Dilation and extraction procedure" does not include either the suction curettage procedure of abortion or the suction aspiration procedure of abortion.

(B) No person shall knowingly perform or attempt to perform a dilation and extraction procedure upon a pregnant woman.

(C)(1) It is an affirmative defense to a charge under division (B) of this section that all other available abortion procedures would pose a greater risk to the health of a pregnant woman than the risk posed by the dilation and extraction procedure.

(2) Notwithstanding section 2901.05 of the Revised Code, if a person charged with a violation of division (B) of this section presents prima facie evidence relative to the affirmative defense set forth in division (C)(1) of this section, the prosecution, in addition to proving all elements of the violation by proof beyond a reasonable doubt, has the burden of proving by proof beyond a reasonable doubt that at least one other available abortion procedure would not pose a greater risk to the health of the pregnant woman than the risk posed by the dilation and extraction procedure performed or attempted to be performed by the person charged with the violation of division (B) of this section.

(D) Whoever, violates division (B) of this section is guilty of performing an unlawful abortion procedure, a felony of the fourth degree.

(E) A pregnant woman upon whom a dilation and extraction procedure is performed or attempted to be performed in violation of division (B) of this section is not guilty of an attempt to commit, complicity in the commission of, or conspiracy in the commission of a violation of that division.

2919.16 Definitions

As used in sections 2919.16 to 2919.18 of the Revised Code:

(A) "Fertilization" means the fusion of a human spermatozoon with a human ovum.

(B) "Gestational age" means the age of an unborn human as calculated from the first day of the last menstrual period of a pregnant woman.

(C) "Health care facility" means a hospital, clinic, ambulatory surgical treatment center, other center, medical school, office of a physician, infirmary, dispensary, medical training institution, or other institution or location in or at which medical care, treatment, or diagnosis is provided to a person.

(D) "Hospital" has the same meanings as in section 2108.01, 3701.01 and 5122.01 of the Revised Code.

(E) "Live birth" has the same meaning as in division (A) of section 3705.01 of the Revised Code.

(F) "Medical emergency" means a condition that a pregnant woman's physician determines, in good faith and in the exercise of reasonable medical judgement, so complicates the woman's pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman that delay in the performance or inducement of the abortion would create.

(G) "Physician" has the same meaning as in section 2305.11 of the Revised Code.

(H) "Pregnant" means the human female reproductive condition, that commences with fertilization, of having a developing fetus.

(I) "Premature infant" means a human whose live birth occurs prior to thirty-eight weeks of gestational age.

(J) "Serious risk of the substantial and irreversible

impairment of a major bodily function" means any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function, including, but not limited to, the following conditions:

(1) Pre-eclampsia;

(2) Inevitable abortion;

(3) Prematurely ruptured membrane;

(4) Diabetes;

(5) Multiple sclerosis.

(K) "Unborn human" means an individual organism of the species homo sapiens from fertilization until live birth.

(L) "Viable" means the stage of development of a human fetus at which in the determination of a physician, based on the particular facts of a woman's pregnancy that are known to the physician and in light of medical technology and information reasonably available to the physician, there is a realistic possibility of the maintaining and nourishing of a life outside of the womb with or without temporary artificial life-sustaining support.

2919.17 Terminating a human pregnancy after viability.

(A) No person shall purposely perform or induce or attempt to perform or induce an abortion upon a pregnant woman if the unborn human is viable, unless either of the following applies:

(1) The abortion is performed or induced or attempted to be performed or induced by a physician, and that physician determines, in good faith and in the exercise of reasonable medical judgment, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.

(2) The abortion is performed or induced or attempted to be performed or induced by a physician and that physician determines, in good faith and in the exercise of reasonable medical judgment, after making a determination relative to the viability of the unborn human in conformity with division (a) of section 2919.18 of the Revised Code, that the unborn human is not viable.

(B)(1) Except as provided in division (B)(2) of this section, no physician shall purposely perform or induce or attempt to perform or induce an abortion upon a pregnant woman when the unborn human is viable and when the physician has determined, in good faith and in the exercise of reasonable medical judgement, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman, unless each of the following conditions is satisfied:

(a) The physician who performs or induces or attempts to perform or induce the abortion certifies in writing that that physician has determined, in good faith and in the exercise of reasonable medical judgment, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.

(b) The determination of the physician who performs or induces or attempts to perform or induce the abortion that is described in division (B)(1)(a) of this section is concurred in by at least one other physician who certifies in writing that the concurring physician has determined in good faith, in the exercise of reasonable medical judgment, and following a review of the available medical records of and any available tests results pertaining to the pregnant woman, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.

(c) The abortion is performed or induced to attempted to be performed or induced in a health care facility that has or has access to appropriate neonatal services for premature infants.

(d) The physician who performs or induces or attempts

to perform or induce the abortion terminates or attempts to terminate the pregnancy in the manner that provides the best opportunity for the unborn human to survive, unless that physician determines, in good faith and in the exercise of reasonable medical judgment, that the termination of the pregnancy in that manner poses a significantly greater risk of the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman than would other available methods of abortion.

(e) The physician who performs or induces or attempts to perform or induce the abortion has arranged for the attendance in the same room in which the abortion is to be performed or induced or attempted to be performed or induced of at least one other physician who is to take control of, provide immediate medical care for, and take all reasonable steps necessary to preserve the life and health of the unborn human immediately upon the unborn human's complete expulsion or extraction from the pregnant woman.

(2) Division (B)(1) of this section does not prohibit the performance or inducement or an attempted performance or inducement of an abortion without prior satisfaction of each of the conditions described in divisions (B)(1)(a) to (e) of this section if the physician who performs or induces or attempts to perform or induce the abortion determines, in good faith and in the exercise of reasonable medical judgment, that a medical emergency exists that prevents compliance with one or more of those conditions.

(C) For purposes of this section, it shall be rebuttably presumed that an unborn child of a least twenty-four weeks of gestational age is viable.

(D) Whoever violates this section is guilty of terminating or attempting to terminate a human pregnancy after viability, a felony of the fourth degree.

(E) A pregnant woman upon whom an abortion is performed or induced or attempted to be performed or induced in violation of division (A) or (B) of this section is not guilty of an attempt to commit, complicity in the commission of, or conspiracy in the commission of a violation of either of those divisions.

2919.18 Failure to perform viability testing on fetus.

(A)(1) Except as provided in division (A)(3) of this section, no physician shall perform or induce or attempt to perform or induce an abortion upon a pregnant woman after the beginning of her twenty-second week of pregnancy unless, prior to the performance or inducement of the abortion or the attempt to perform or induce the abortion, the physician determines, in good faith and in the exercise of reasonable medical judgment, that the unborn human is not viable, and the physician makes that determination after performing a medical examination of the pregnant woman and after performing or causing the performing of gestational age, weight, lung maturity, or other tests of the unborn human that a reasonable physician making a determination as to whether an unborn human is or is not viable would perform or cause to be performed.

(2) Except as provided in division (A)(3) of this section, no physician shall perform or induce or attempt to perform or induce an abortion upon a pregnant woman after the beginning of her twenty-second week of pregnancy without first entering the determination described in division (A)(1) of this section and the associated findings of the medical examination and tests described in that division in the medical record of the pregnant woman.

(3) Divisions (A)(1) and (2) of this section do not prohibit a physician from performing or inducing or attempting to perform or induce an abortion upon a pregnant woman after the beginning of her twenty-second week of pregnancy without making the determination described in division (A)(1) of this section or without making the entry described in division (A)(2) of this section if a medical emergency exists.

(B) Whoever violates this section is guilty of failure to

perform viability testing, a misdemeanor of the fourth degree.

2307.51 Civil action for dilation and extraction procedure.

(A) As used in this section:

(1) "Dilation and extraction procedure" has the same meaning as in section 2919.15 of the Revised Code.

(2) "Frivolous conduct" has the same meaning as in section 2323.51 of the Revised Code.

(B)(1) A woman upon whom a dilation and extraction procedure is performed in violation of division (B) of section 2919.15 of the Revised Code has and may commence a civil action for compensatory damages, punitive or exemplary damages if authorized by section 2315.21 of the Revised Code, and court costs and reasonable attorney's fees against the person who performed the dilation and extraction procedure.

(2) A woman upon whom a dilation and extraction procedure is attempted in violation of division (B) of section 2919.15 of the Revised Code has and may commence a civil action for compensatory damages, punitive or exemplary damages if authorized by section 2315.21 of the Revised Code, and court costs and reasonable attorneys [*sic*] fees against the person who attempted to perform the dilation and extraction procedure.

(C) It is an affirmative defense in a civil action commenced pursuant to division (B)(1) or (2) of this section that all other available abortion procedures would pose a greater risk to the health of the woman upon whom the dilation and extraction procedure was performed or attempted to be performed than the risk posed by the dilation and extraction procedure that was performed or attempted to be performed.

(D) If a judgment is rendered in favor of the defendant in a civil action commenced pursuant to division (B)(1) or (2) of this section and the court finds, upon the filing of a motion under section 2323.51 of the Revised Code, that the commencement of the civil action constitutes frivolous conduct and that the defendant was adversely affected by the frivolous conduct, the court shall award in accordance with section 2323.51 of the Revised Code reasonable attorney's fees to the defendant.

2307.52 Civil action for terminating a human pregnancy after viability.

(A) As used in this section:

(1) "Frivolous conduct" has the same meaning as in section 2323.51 of the Revised Code.

(2) "Viable" has the same meaning as in section 2919.16 of the Revised Code.

(B)(1) A woman upon whom an abortion is purposely performed or induced or attempted to be performed or induced in violation of division (A) of section 2919.17 of the Revised Code has and may commence a civil action for compensatory damages, punitive or exemplary damages if authorized by section 2315.21 of the Revised Code, and court costs and reasonable attorney's fees against the person who purposely performed or induced or attempted to perform or induce the abortion in violation of division (A) of section 2919.17 of the Revised Code.

(2) A woman upon whom an abortion is purposely performed or induced or attempted to be performed or induced in violation of division (B) of section 2919.17 of the Revised Code has and may commence a civil action for compensatory damages, punitive or exemplary damages if authorized by section 2315.21 of the Revised Code, and court costs and reasonable attorney's fees against the person who purposely performed or induced or attempted to perform or include the abortion in violation of division (B) of section 2919.17 of the Revised Code.

(C) If a judgment is rendered in favor the defendant in a civil action commenced pursuant to division (B)(1) or (2) of this section and the court finds, upon the filing of a motion under section 2323.51 of the Revised Code, that the commencement of the civil action constitutes frivolous conduct

and that the defendant was adversely affected by the frivolous conduct, the court shall award in accordance with section 2323.51 of the Revised Code reasonable attorney's fees to the defendant.

2305.11 Time limitations for bringing certain actions; extensions; effect of legal disability.

***

(C) A civil action for unlawful abortion pursuant to section 2919.12 of the Revised Code, a civil action authorized by division (H) of section 2317.56 of the Revised Code, a civil action pursuant to division (B)(1) or (2) of section 2307.51 of the Revised Code for performing a dilation and extraction procedure or attempting to perform a dilation and extraction procedure in violation of section 2919.15 of the Revised Code, and a civil action pursuant to division (B)(1) or (2) of section 2307.52 of the Revised Code for terminating or attempting to terminate a human pregnancy after viability in violation of division (A) or (B) of section 2919.17 of the Revised Code shall be commenced within one year after the performance or inducement of the abortion, within one year after the attempt to perform or induce the abortion of division (A) or (B) of section 2919.17 of the Revised Code, within one year after the performance of the dilation and extraction procedure, or, in the case of a civil action pursuant to division (B)(2) of section 2307.51 of the Revised Code, within one year after the attempt to perform the dilation and extraction procedure.

(12)

Supreme Court, U.S.
FILED

No. _____ 97-934 DEC 5 1997

OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

GEORGE VOINOVICH, et al.,

Petitioners,

v.

WOMEN'S MEDICAL PROFESSIONAL CORP., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
APPENDIX VOLUME I of II

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APPENDIX

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Nos. 96-3157, 96-3159

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WOMEN'S MEDICAL
PROFESSIONAL CORP., et al.,
Plaintiffs-Appellees,

v.

GEORGE VOINOVICH, et al.,
Defendants-Appellants

Decided and Filed Nov. 18, 1997.

Appeal from the United States District Court for the Southern District of Ohio at Dayton.

No. 95-00414--Walter H. Rice, Chief District Judge.

Before: BROWN, KENNEDY, and BOGGS, Circuit Judges.

KENNEDY, J., delivered the opinion of the court, in which BROWN, J., joined. BOGGS, J. (pp. 49-64), delivered a separate dissenting opinion.

OPINION

KENNEDY, Circuit Judge. This case involves a facial challenge to the constitutionality of House Bill 135 ("Act"), which was enacted by the Ohio General Assembly on August 16, 1995, and was to have gone into effect on November 14, 1995. The District Court held unconstitutional the three major portions of the Act: (1) the ban on the use of the "dilation and extraction" (D & X) abortion procedure; (2) the ban on the

performance of post-viability abortions; and (3) the viability testing requirement. The District Court further held that no other part of the Act was either constitutional or severable. It therefore enjoined enforcement of the entire Act. For the following reasons, we AFFIRM.

I. Facts

A. House Bill 135

The Act creates two separate bans as well as separate requirements with regard to post-viability abortions. First, the Act bans the use of the D & X procedure in all abortions, i.e. pre- and post-viability: "No person shall knowingly perform or attempt to perform a dilation and extraction procedure upon a pregnant woman." Ohio Rev. Code Ann. § 2919.15(B) (Anderson 1996). The D & X procedure is defined as:

> [T]he termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain. "Dilation and extraction procedure" does not include either the suction curettage procedure of abortion or the suction aspiration procedure of abortion.

Id. § 2919.15(A). Physicians who are criminally prosecuted or sued civilly for violating this ban may assert, as an affirmative defense, that all other available abortion procedures would have posed a greater risk to the health of the pregnant woman. Id. § 2919.15(C)(1) (governing criminal actions); id. § 2307.51(C) (Anderson Supp. 1995) (governing civil actions). In a criminal action, if the physician establishes a prima facie case in support of the affirmative defense, the prosecutor must prove beyond a reasonable doubt that at least one other available abortion procedure would not have posed a greater risk to the health of

the pregnant woman than the risk posed by the D & X procedure. Id. § 2919.15(C)(2).

Second, the Act provides that "[n]o person shall purposely perform or induce or attempt to perform or induce an abortion upon a pregnant woman if the unborn human is viable," except in the following two circumstances:

> (1) The abortion is performed or induced or attempted to be performed or induced by a physician, and that physician determines, in good faith and in the exercise of reasonable medical judgment, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.
>
> (2) The abortion is performed or induced or attempted to be performed or induced by a physician and that physician determines, in good faith and in the exercise of reasonable medical judgment, after making a determination relative to the viability of the unborn human in conformity with division (A) of Section 2919.18 of the Revised Code, that the unborn human is not viable.

Id. § 2919.17(A). For purposes of the post-viability ban, any fetus of at least twenty-four weeks gestational age is rebuttably presumed to be viable. Id. § 2919.17(C).[1]

---

[1]Gestational age is calculated from the first day of the last menstrual period of the pregnant woman. Ohio Rev. Code Ann. § 2919.16(B).

Section 2919.18(A), the viability testing provision, requires that no abortion shall be performed or attempted to be performed "after the beginning of [a pregnant woman's] twenty-second week of pregnancy" unless the physician determines "in good faith and in the exercise of reasonable medical judgment, that the unborn human is not viable, and the physician makes that determination after performing a medical examination of the pregnant woman and after performing or causing the performing" of tests that a "reasonable physician" would make to determine viability. Id. § 2919.18(A)(1). The viability testing provision need not be complied with if a medical emergency exists.[2] Id. § 2919.18(A)(3).

---

[2]The Act defines "medical emergency" as follows:

> [A] condition that a pregnant woman's physician determines, in good faith and in the exercise of reasonable medical judgment, so complicates the woman's pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman that delay in the performance or inducement of the abortion would create.

Id. § 2919.16(F). "Serious risk of the substantial and irreversible impairment of a major bodily function" means

> any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function, including, but not limited to, the following conditions:
>
> (1) Pre-eclampsia;
> (2) Inevitable abortion;
> (3) Prematurely ruptured membrane;
> (4) Diabetes;
> (5) Multiple sclerosis.

Id. § 2919.16(J).

Finally, any physician intending to perform a post-viability abortion, having determined that an abortion is "necessary", must meet several requirements: (1) the physician must certify the necessity of the abortion in writing; (2) a second physician must certify the necessity of the abortion in writing, after reviewing the patient's medical records and tests; (3) the abortion must be performed in a health care facility which has access to neonatal services for premature infants; (4) the physician must choose the abortion method which provides the best opportunity for the fetus to survive, unless it would pose a significantly greater risk of death to the pregnant woman, or a serious risk of substantial and irreversible impairment to a major bodily function; and (5) a second physician must be present at the abortion to care for the unborn human. Id. § 2919.17(B)(1). The physician need not comply with these conditions if the physician determines that a medical emergency exists. Id. § 2919.17(B)(2).

The Act creates civil and criminal liability for violations of the D & X ban and the post-viability ban, and criminal liability for violations of the viability testing requirement. Violation of either the D & X ban or the post- viability ban is a fourth degree felony. Id. §§ 2919.15(D), 2919.17(D). Violation of the viability testing requirement is a fourth degree misdemeanor. Id. § 2919.18(b). A patient upon whom either a D & X or a post-viability abortion is performed or attempted to be performed is not criminally liable. Id. §§ 2919.15(E), 2919.17(E). She may, however, sue within one year of a

violation of either the D & X ban or the post-viability ban for compensatory, punitive, and exemplary damages, as well as for costs and attorney's fees. Id. §§ 2307.51(B), 2307.52(B). Derivative claims for relief may also be brought. Id. § 2305.11(D)(3) & (7).

B. Procedural History

Plaintiff Women's Medical Professional Corporation (WMPC) operates clinics and provides abortion services in Montgomery, Hamilton, and Summit Counties, Ohio. Plaintiff Martin Haskell, M.D., is a doctor affiliated with plaintiff WMPC. He formerly performed abortions after the twenty-fourth week of pregnancy, but no longer does so. He uses the D & X procedure for abortions during the twenty-first to twenty-fourth weeks of gestation.[3] On October 27, 1995, plaintiffs filed suit for declaratory and injunctive relief from all provisions of the Act, both on their own behalf and on behalf of their patients. Plaintiffs allege that the Act imposes an undue burden on the rights of pregnant women to choose an abortion

[3]Appellants argued below that plaintiff Haskell lacks standing to challenge the post-viability provisions, because he only performs the D & X procedure up through the twenty-fourth week of pregnancy. The District Court held that plaintiff Haskell does have standing. See Women's Med. Prof'l Corp. v. Voinovich, 911 F. Supp. 1051, 1058-59 (S.D. Ohio 1995). The Court reasoned that the ban on post-viability abortions imposes a rebuttable presumption of viability at twenty-four weeks, Ohio Rev. Code Ann. § 2919.17(c), and that if plaintiff Haskell is unable to rebut that presumption in some cases, the remaining post-viability regulations will apply to him. Additionally, plaintiff Haskell will have to satisfy the viability testing requirement for any patients he treats who are in or beyond their twenty-second week of pregnancy. Appellants do not appeal this ruling.

and, further, that the Act's provisions are unconstitutionally vague. They seek to enjoin enforcement of the Act as a violation of their rights to privacy, liberty, and due process, as guaranteed by the Fourteenth Amendment to the United States Constitution.

After two days of testimony, the District Court granted a ten-day Temporary Restraining Order (TRO) on November 13, 1995. This TRO was extended for an additional ten days and was set to expire on December 13. In the interim, the court conducted four additional days of hearings on the constitutionality of the Act. On December 13, the District Court issued a preliminary injunction, concluding that plaintiffs had demonstrated a substantial likelihood of success of showing that the entire Act was unconstitutional and that the issuance of a preliminary injunction was otherwise appropriate. See Woman's Med. Prof'l Corp. v. Voinovich, 911 F. Supp. 1051, 1092-94 (S.D. Ohio 1995). Subsequently, the parties stipulated to the consolidation of the preliminary injunction hearings with a trial upon the merits. Thus, on January 12, 1996, the preliminary injunction was converted into a permanent injunction. The District Court did not issue another opinion. Appellants filed a timely notice of appeal.

II. Discussion

A. Standard of Review

This court reviews questions of law de novo. Kellogg v. Shoemaker, 46 F.3d 503, 506 (6th Cir.), cert. denied, --- U.S. ----, 116 S. Ct. 120, 133 L.Ed.2d 70, and cert. denied, --- U.S. ----, 116 S. Ct. 274, 133 L.Ed.2d 195 (1995). While we normally review questions of fact for clear error, see Fed. R.

Civ. P. 52, an appellate court is to conduct an independent review of the record when constitutional facts are at issue. See Jacobellis v. Ohio, 378 U.S. 184, 190 & n. 6, 84 S. Ct. 1676, 12 L.Ed.2d 793 (1964).

B. Legal Standards

Plaintiffs essentially challenge the constitutionality of the Act on two grounds. First, they assert that the Act's provisions are unconstitutional under Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992), because they impose undue burdens on a woman's right to choose an abortion or they jeopardize the pregnant woman's health. Second, they assert that a number of the Act's provisions are unconstitutionally vague. We first address the legal standards governing these claims.

1. Substantive Law Governing Abortion Regulations

In Roe v. Wade, 410 U.S. 113, 152-66, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973), the Supreme Court held that a pregnant woman has a constitutional right, under the Due Process Clause of the Fourteenth Amendment, to choose to terminate her pregnancy before viability. In Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 879, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), the Court reaffirmed this "central holding" of Roe, which mandates that a State may not prohibit a woman from making the ultimate decision to terminate her pregnancy prior to viability. However, a plurality of the Casey Court discarded the trimester framework of Roe, explaining that the State has a profound interest in potential life throughout pregnancy. See id. at 872-76. The plurality then articulated the "undue burden" standard as the appropriate means of reconciling the State's interests with the woman's

constitutionally protected liberty. See id. at 876. They explained that "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Id. at 877. States therefore can regulate abortion pre-viability as long as such regulation does not constitute an undue burden on a woman's right to choose to have an abortion. Finally, the Casey Court reaffirmed Roe's holding that" 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.' " Id. at 879 (quoting Roe, 410 U.S. at 164-65).[4]

Since Casey, a number of state legislatures have enacted laws regulating pre-viability abortions, and federal courts have considered the constitutionality of some of these regulations. See, e.g., Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452 (8th Cir.1995) (holding unconstitutional parental notification provisions, criminal-penalty provisions, and civil-damages provisions, and holding constitutional mandatory information requirements), cert. denied sub nom. Janklow v. Planned Parenthood, Sioux Falls Clinic, --- U.S. ----, 116 S.Ct. 1582, 134 L.Ed.2d 679 (1996); Fargo Women's Health Org. v. Schafer, 18 F.3d 526 (8th Cir.1994) (holding constitutional informed consent requirements, a mandatory information requirement, a twenty-four hour waiting period, and a medical emergency definition). Only one court has addressed the constitutionality of an abortion law that banned abortions post-viability, but that court applied Casey 's undue burden

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[4]While only three justices joined in the portion of the opinion in which this language is quoted, the separate opinions of two additional justices reaffirmed Roe.

standard. See Jane L. v. Bangerter, 102 F.3d 1112, 1115-18 (10th Cir.1996) (holding that a ban on abortions after twenty-weeks gestational age would pose an undue burden, because, by irrebuttably presuming viability at twenty weeks, the law prohibits the abortion of fetuses that may be nonviable), cert. denied sub nom. Leavitt v. Jane L., --- U.S. ----, 117 S. Ct. 2453, 138 L.Ed.2d 211 (1997). While the District Court in this case and the Eastern District of Michigan, in Evans v. Kelly, No. 97-CV-71246-DT, 1997 WL 471906 (E.D. Mich. July 31, 1997), have addressed the constitutionality of bans on the D & X procedure, we are the first United States Court of Appeals to consider this issue. We therefore venture into a relatively novel area of abortion law with this case.

2. Standard for Reviewing Facial Challenges to Abortion Law

The first issue disputed on appeal is the proper standard for reviewing challenges to the facial validity of laws regulating abortion. Appellants argue that the test set out in United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), applies, while plaintiffs maintain that the Supreme Court's analysis in Casey displaces Salerno in the abortion context. This is a question of first impression for this circuit. We join the majority of courts that have considered this issue and conclude that Salerno is not applicable to facial challenges to abortion regulations.

A court may hold a statute unconstitutional either because it is invalid "on its face" or because it is unconstitutional "as applied" to a particular set of circumstances. Each holding carries an important difference in terms of outcome: If a statute is unconstitutional as applied, the State may continue to enforce the statute in different circumstances where it is not unconstitutional, but if a statute is unconstitutional on its face, the State may not enforce the

statute under any circumstances. Traditionally, a plaintiff's burden in an as-applied challenge is different from that in a facial challenge. In an as-applied challenge, "the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional." Ada v. Guam Soc'y of Obstetricians and Gynecologists, 506 U.S. 1011, 1012, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992) (Scalia, J., dissenting), denying cert. to 962 F.2d 1366 (9th Cir.1992). Therefore, the constitutional inquiry in an as-applied challenge is limited to the plaintiff's particular situation. In comparison, the Court explained in Salerno that

> [a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [an Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

481 U.S. at 745. In other words, a facial challenge to a statute should fail if the statute has a constitutional application. The Supreme Court applied the Salerno "no set of circumstances" test in a couple of pre-Casey cases involving state abortion regulations. See Rust v. Sullivan, 500 U.S. 173, 183, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 514, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990); see also Webster v. Reproductive Health Servs., 492 U.S. 490, 524, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (O'Connor, J., concurring).

In Casey, however, the Court stated that an abortion law is unconstitutional on its face if "in a large fraction of the cases

in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." 505 U.S. at 895. This analysis is inconsistent with the rule set forth in Salerno. Under Salerno, no factual showing of unconstitutional applications can render a law unconstitutional if it has any constitutional applications. Under Casey, a factual showing of unconstitutional applications, in a substantial percentage of the cases where a law applies, can render a law unconstitutional even if the law has constitutional applications.

Moreover, the Casey Court's evaluation of the Pennsylvania statute at issue demonstrates the change Casey wrought. For example, rather than rejecting plaintiffs' facial challenge to Pennsylvania's spousal notification provision on the ground that they had not established that "no set of circumstances exists under which the Act would be valid," Salerno, 481 U.S. at 745, the Court struck down the provision because the record showed that "in a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion," 505 U.S. at 895. See Casey, 505 U.S. at 887-95. The State of Pennsylvania argued that the provision imposed almost no burden for the vast majority of women seeking abortion, and the Court seemed to accept the State's claim that the provision in fact affected only one percent of women. Id. at 894. But the Court explained that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." Id.

Although Casey does not expressly purport to overrule Salerno, in effect it does. Indeed, the Chief Justice recognized as much in his dissent. See id. at 972 (Rehnquist, C.J., dissenting in part) ("[B]ecause this is a facial challenge to the Act, it is insufficient for petitioners to show that the [spousal] notification provision 'might operate unconstitutionally under some conceivable set of circumstances.' United States v.

Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)."). Since Casey, most courts have held that Casey displaces Salerno in the abortion context. See Jane L. v. Bangerter, 102 F.3d 1112, 1116 (10th Cir. 1996) (noting the difference between the Salerno and Casey standards and holding that the Casey standard applies to facial challenges to abortion regulations) cert. denied sub nom. Leavitt v. Jane L., --- U.S. ----, 117 S.Ct. 2453, 138 L.Ed.2d 211 (1997); Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1456-58 (8th Cir.1995) holding that Casey effectively overruled Salerno for facial challenges to abortion statutes), cert. denied sub nom. Janklow v. Planned Parenthood, Sioux Falls Clinic, --- U.S. ----, 116 S. Ct. 1582, 134 L.Ed.2d 679 (1996); Casey v. Planned Parenthood of Southeastern Pennsylvania, 14 F.3d 848, 863 n. 21 (3d Cir.) (stating in dicta that "we agree with the Commonwealth and the clinics that the Court has, in this case, set a new standard for facial challenges to pre-viability abortion laws," by requiring "only that a plaintiff show an abortion regulation would be an undue burden 'in a large faction of the cases' "), stay denied, 510 U.S. 1309, 114 S. Ct. 909, 127 L.Ed.2d 352 (1994); A Woman's Choice-East Side Women's Clinic v. Newman, 904 F. Supp. 1434, 1447-48 (S.D. Ind. 1995) ("[L]ike the Third and Eighth Circuits, this court believes that Casey effectively displaced Salerno 's application to abortion laws."), certifying questions to 671 N.E.2d 104 (Ind.1996); Utah Women's Clinic, Inc. v. Leavitt, 844 F. Supp. 1482, 1489 (D. Utah 1994) (suggesting a hybrid standard by holding that "to bring a facial challenge in good faith, one must reasonably believe that the statute is incapable of being applied constitutionally [i.e., Salerno] in a large fraction of the cases in which it is relevant [i.e., Casey]"), appeal dismissed in part and judgment rev'd in part on other grounds, 75 F.3d 564 (10th Cir. 1995), cert. denied, --- U.S. ----, 116 S. Ct. 2551, 135 L.Ed.2d 1070 (1996); see also Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 STAN. L.REV. 235, 276 (1994) (arguing that the

Casey Court applied a "substantial overbreadth" test, which conflicts with Salerno but is consistent with other substantive due process decisions). Only the Fifth Circuit continues to apply Salerno in cases involving facial challenges to abortion regulations. See Barnes v. Moore, 970 F.2d 12, 14 n.2 (5th Cir.) (stating that "[t]he Casey joint opinion may have applied a somewhat different standard in striking down the spousal notification provision . . . . Nevertheless, we do not interpret Casey as having overruled, sub silentio, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes"), cert. denied, 506 U.S. 1021, 113 S. Ct. 656, 121 L.Ed.2d 582 (1992); accord Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1102-04 (5th Cir.1997).

The Supreme Court itself appears to be split on this question regarding Salerno 's continued vitality in cases involving abortion regulations. Although the Court has yet to address the issue in a decision, members of the Court have offered their opinions in memoranda denying petitions for certiorari and applications for stays and injunctions pending appeal. Justice O'Connor, joined by Justice Souter, has explained the Casey decision as follows:

> In striking down Pennsylvania's spousal-notice provision, we did not require petitioners to show that the provision would be invalid in all circumstances. Rather, we made clear that a law restricting abortions constitutes an undue burden, and hence is invalid, if, "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."

Fargo Woman's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of application for stay and injunction pending appeal) (quoting Casey, 505 U.S.

at 895). In contrast, Justice Scalia, joined by Chief Justice Rehnquist and Justice White, has stated that the only exception to the Salerno rule is for First Amendment cases, and "[t]he Court did not purport to change this well-established rule [in Casey]." Ada v. Guam Soc'y of Obstetricians and Gynecologists, 506 U.S. 1011, 1012-13, 113 S. Ct. 633, 121 L.Ed.2d 564 (1992) (Scalia, J., dissenting), denying cert. to 962 F.2d 1366 (9th Cir. 1992). Additionally, Justice Stevens has criticized the Salerno rule as "rhetorical flourish . . . unsupported by citation or precedent." Janklow v. Planned Parenthood, Sioux Falls Clinic, --- U.S. ----, ----, 116 S. Ct. 1582, 1583, 134 L.Ed.2d 679 (1996) (Stevens, J., mem.), denying cert. to Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452 (8th Cir. 1995). Justice Stevens cited Casey and other non- abortion cases as support for his proposition that "Salerno 's rigid and unwise dictum has been properly ignored in subsequent cases." Id. at 1583 & n.1. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented from the denial of certiorari in Janklow, stating that the question whether Salerno still applies in the abortion context is a "question that virtually cries out for our review." Id. at 1584 (Scalia, J., dissenting).

We hold that this circuit should "follow what the Supreme Court actually did--rather than what it failed to say--and apply the undue-burden test," Planned Parenthood, Sioux Falls Clinic, 63 F.3d at 1458, without regard to Salerno. Therefore, in deciding whether the Act's regulation of pre-viability abortions, specifically the D & X ban, violates the Constitution, we must consider the record and determine whether "in a large fraction of the cases in which [the ban] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion," Casey, 505 U.S. at 895. Even if the Act has some constitutional applications, we must strike it down if it is unconstitutional under Casey.

The courts that have considered Salerno 's applicability since Casey have all been faced with what they construed as challenges to pre-viability abortion measures. No court has considered whether Casey displaces Salerno in cases involving facial challenges to post-viability abortion regulations.[5] As the District Court stated, Casey is not dispositive, because it "does not evaluate whether a law restricting access to post-viability abortions is invalid simply because it may jeopardize the life or health of a few (or many) pregnant women who need such an abortion." 911 F. Supp. at 1062. We can see no reason to apply a different standard for pre- and post-viability abortion. We conclude that Casey 's analysis should be extended to post-viability abortion regulations.

The Casey Court expressly reaffirmed Roe 's holding that throughout a woman's pregnancy a State cannot interfere with a woman's choice to have an abortion if continuing her pregnancy would constitute a threat to her health. See Casey, 505 U.S. at 880. Significantly, the Casey Court cited Harris v. McRae, 448 U.S. 297, 316 (1980), in which the Court stated:

> Because even the compelling interest of the State in protecting potential life after fetal viability was held [in Roe] to be insufficient to outweigh a woman's decision to protect her life or health, it could be argued that the freedom of

---

[5]As mentioned earlier, the one court since Casey that considered a facial challenge to a state law regulating post-viability abortions construed that law as a pre-viability measure and consequently applied Casey 's undue burden standard. See Jane L. v. Bangerter, 102 F.3d 1112, 1115-16 (10th Cir.1996), cert. denied sub nom. Leavitt v. Jane L., --- U.S. ----, 117 S. Ct. 2453, 138 L.Ed.2d 211 (1997).

> a woman to decide whether to terminate her pregnancy for health reasons does in fact lie at the core of the constitutional liberty identified in [Roe].

See Casey, 505 U.S. at 880 (emphasis added). Given the predominance of a woman's interest in her own life and health, we believe the Casey Court's "large fraction of the relevant population" test should be followed when considering facial challenges to post-viability abortion regulations. As the District Court pointed out:

> [B]ecause the Supreme Court signalled in Casey that an unconstitutional infringement of the liberty interests of some, but not all, pregnant women, is sufficient to justify application of a lesser standard where a pre-viability abortion is concerned, there is no reason why the Court would not similarly apply a lesser standard where a law threatens to deprive some, but not all, pregnant women of their greater constitutional interest in their own life and health.

911 F. Supp. at 1062. Even though the State has a right to ban post- viability abortion, and therefore applications of the ban will be constitutional where a woman's health and life are not at risk, a post- viability abortion regulation which threatens the life or health of even a few pregnant women should be deemed unconstitutional. "The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." Casey, 505 U.S. at 894. The State's regulation of post-viability abortions is most relevant to women seeking legal post-viability abortions due to medical necessity or medical emergency. If the State's ban on post-viability abortions does not allow those women to choose

to have an abortion in such circumstances, thereby infringing upon their right to protect their life and health, the ban should be held unconstitutional. A woman should not have to wait until she has been unconstitutionally deprived of her life or health before she may challenge a post-viability abortion regulation. We will therefore follow Casey in considering the constitutionality of the pre-viability and post-viability abortion regulations.

3. Standard for Vagueness Challenges

Plaintiffs challenge the D & X procedure, the medical emergency exception, and the medical necessity provision as unconstitutionally vague. The Supreme Court has stated general standards for evaluating whether a statute is unconstitutionally vague:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972) (footnotes omitted). In addition, "[t]he requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be

exercised only on behalf of policies reflecting an authoritative choice among competing social values . . and permits meaningful judicial review." Roberts v. United States Jaycees, 468 U.S. 609, 629, 104 S. Ct. 3244, 82 L.Ed.2d 462 (1984). Yet, the Court also has said that a statute is void only if it is so vague that "no standard of conduct is specified at all." Coates v. City of Cincinnati, 402 U.S. 611, 614, 91 S. Ct. 1686, 29 L.Ed.2d 214 (1971).

This court has explained that "[a]t times the Court has suggested that a statute that does not run the risk of chilling constitutional freedoms is void on its face only if it is impermissibly vague in all its applications, but at other times it has suggested that a criminal statute may be facially invalid even if it has some conceivable application." Springfield Armory, Inc. v. City of Columbus, 29 F.3d 250, 251-52 (6th Cir. 1994) (citing Kolender v. Lawson, 461 U.S. 352, 358-59 n. 8, 103 S. Ct. 1855, 75 L.Ed.2d 903 (1983); Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495, 102 S. Ct. 1186, 71 L.Ed.2d 362 (1982); and Colautti v. Franklin, 439 U.S. 379, 394-401, 99 S. Ct. 675, 58 L.Ed.2d 596 (1979)). We therefore must keep in mind that "[t]he degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment." Hoffman Estates, 455 U.S. at 498. When criminal penalties are at stake, a relatively strict test is warranted. Id. at 498-99; Springfield Armory, 29 F.3d at 252. "Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." Hoffman Estates, 455 U.S. at 499.

C. D & X Ban

1. Introduction

The District Court found the provisions relating to the Act's ban on the performance or attempted performance of any abortion using the D & X procedure unconstitutional on several bases. First, it found that the Act's definition of the D & X procedure is unconstitutionally vague, because it could be construed as including within its ambit the more widespread abortion procedure known as dilation and evacuation (D & E) and, therefore, it does not provide physicians fair warning as to what conduct is permitted. See 911 F. Supp. at 1063-67. Second, the court found that the D & X procedure is potentially safer than other available abortion procedures; therefore, it held that under Planned Parenthood of Cen. Missouri v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L.Ed.2d 788 (1976), the State could not ban the procedure and that under Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674, such a ban would be an undue burden because it would force women to undergo riskier and more deleterious abortion procedures. See 911 F. Supp. at 1067-71. Finally, the District Court considered the State's asserted interest in banning the D & X procedure and determined that, although the State's purpose was legitimate, the ban did not serve that purpose.[6] Id. at 1071-75. We agree with the District Court that the D & X ban is unconstitutional, but through somewhat different reasoning.

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[6]The General Assembly declared that its interest in enacting the D & X ban is to "prevent[ ] unnecessary cruelty to the human fetus." H. 135, § 3, 121st Gen. Ass. (Ohio 1995).

2. The Definition of the Prohibited Procedure

The Act defines the D & X procedure as "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain." Ohio Rev. Code Ann. § 2919.15(A). The definition further provides that the D & X procedure "does not include either the suction curettage procedure of abortion or the suction aspiration procedure of abortion." Id. We agree with the District Court that the record shows that the Act's definition of the banned procedure encompasses the D & E procedure. Although the District Court's opinion details the evidence submitted with regard to a number of different abortion procedures, we believe it would be useful to summarize how and when the three procedures implicated by the Act are performed, in order to demonstrate the Act's failure to adequately distinguish between the D & E and D & X procedures.

During the first trimester, the most common method of abortion is the suction curettage, or suction aspiration, procedure.[7] When performing the suction curettage procedure, the physician mechanically dilates the pregnant woman's cervix by means of metal rods, inserts a vacuum apparatus into the uterus, and removes the fetal matter by means of negative suction. Suction curettage can sometimes be performed up to the fifteenth week of pregnancy.

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[7]Although the Act suggests that these are different methods of abortion, the terms are actually used interchangeably to describe the same procedure. See Joint Appendix at 607 (testimony of Dr. John Doe Number One), 689 (testimony of George Goler, M.D.); see also Brief of Amici Curiae American College of Obstetricians and Gynecologists, National Abortion Federation, American Civil Liberties Union, and American Civil Liberties Union of Ohio Foundation, Inc., In Support of Plaintiffs-Appellees at 6, 18 n.11.

The most common method of abortion in the second trimester is the D & E procedure. The suction curettage procedure alone is no longer feasible at this point in a woman's pregnancy, because the fetus is too large to remove by use of suction only. In the D & E procedure, the physician inserts laminaria into the pregnant woman's cervix in order to dilate the cervix; laminaria takes about one to two days to accomplish dilation. Once the woman's cervix is dilated, a suction curette of larger diameter than that used in the suction curettage procedure is placed through the cervix and into the uterus. With the suction curette, the physician can remove some or all of the fetal tissue. However, the torso and the head of the fetus often cannot be removed using the suction curette. Therefore, the D & E procedure typically entails dismembering the fetus, beginning with the extremities, by means of suction curettage and forceps. The most difficult part of the D & E procedure is the removal of the fetal head from the woman's uterus, because it is often too large to fit through the partially dilated cervix. Physicians have developed different methods of removing the head. The evidence shows that some physicians compress the head by using suction to remove the intracranial contents. See Nov. 13, 1995 Hearing Transcript at 269-70 (testimony of Harlan Giles, M.D.); Joint Appendix at 598 (testimony of Dr. John Doe Number One), 688 (testimony of Dr. George Goler).

A few physicians, including plaintiff Haskell, employ the D & X procedure, which has also been called the "intact D & E" procedure and the "brain suction" procedure. The D & X procedure is typically used late in the second trimester, between the twentieth and twenty-fourth weeks of pregnancy, inclusive. The D & X procedure takes three days to perform.[8] On the first

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[8]We draw our understanding of the D & X procedure from a paper presented by plaintiff Haskell at the National Abortion Federation Risk Management Seminar in 1992. See

day, the physician puts dilators in the woman's cervix. On the second day, the physician removes the dilators and inserts new dilators in the cervix. On the third day, the dilators are removed and the membranes are ruptured. Then, with the guidance of ultrasound, the physician inserts forceps into the uterus, grasps a lower extremity of the fetus, and pulls the extremity into the vagina. The physician then uses his fingers to deliver the other lower extremity, followed by the torso, the shoulders, and the upper extremities. The head, which is too big to pass through the dilated cervix, remains in the internal cervical opening. At this point, while lifting the cervix and applying traction to the shoulders with his or her fingers, the physician takes a pair of blunt curved Metzenbaum scissors and forces the scissors into the base of the skull. Once the scissors has entered the skull, the physician spreads them to enlarge the opening. Finally, the physician removes the scissors, inserts a suction catheter into the hole, and removes the skull contents. The head will then compress, enabling the physician to remove the fetus completely from the woman.

As this summary demonstrates, the Act's definition of the D & X procedure encompasses the D & E procedure, because the D & E procedure can also entail suctioning the skull contents of the fetus. The primary distinction between the two procedures is that the D & E procedure results in a dismembered fetus while the D & X procedure results in a relatively intact fetus. More specifically, the D & E procedure involves dismembering the fetus in utero before compressing the skull by means of suction, while the D & X procedure involves removing intact all but the head of the fetus from the

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Joint Appendix at 221-28.

uterus and then compressing the skull by means of suction.[9] In both procedures, the fetal head must be compressed, because it is usually too large to pass through a woman's dilated cervix. In the D & E procedure, this is typically accomplished by either suctioning the intracranial matter or by crushing the skull, while in the D & X procedure it is always accomplished by suctioning the intracranial matter.

Apparently conceding that the D & E procedure can entail suctioning the fetal skull contents, appellants contend that the D & X definition only applies to procedures where the pregnancy is "terminated by purposeful insertion of the suction device to remove the brain, which does not occur in later second- trimester D & E abortions, where the suction device is applied to the skull (if at all) after the fetus has been substantially dismembered." Brief of Defendants-Appellants at 32. Although appellants do not make their point explicit, they apparently mean that in a D & E procedure, the pregnancy is terminated by dismemberment, while in a D & X procedure it is terminated by suctioning the intracranial matter. Appellants apparently assume that "termination" refers to the point at which the fetus' life ends rather than the abortion procedure itself. However, the Act's definition refers to the "termination of a human pregnancy" not of a fetal life. "Pregnancy" describes the woman's condition, which we do not believe is terminated until the abortion has been completed.

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[9]We note that the proposed federal legislation prohibiting the performance of "partial-birth" abortions appears to come closer to describing the D & X procedure by defining a "partial-birth" abortion as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery." Partial-Birth Abortion Ban Act of 1997, H.R. 1122, 105th Cong., 1st Sess. (1997). We express no opinion on the constitutionality of this definition or the federal legislation.

Additionally, appellants stipulated that a fetus may be dead at the beginning of the D & X procedure, so termination of the fetus' life may not occur when the brain is suctioned. Finally, to the extent appellants are claiming that the D & E and D & X procedures can be distinguished by the point at which suctioning is employed in each procedure, their argument has no merit, because the Act's definition does not mention dismemberment or at what point in the procedure suctioning is prohibited; rather, the definition only mentions suctioning of the brain.

Appellants also contend that the Act's definition of the D & X procedure does not encompass the D & E procedure, because insertion of a suction device into the fetal skull during the D & E procedure is by "serendipity" or "happenstance" and therefore not "purposeful" as required by the Act's definition. Specifically, appellants point to the testimony of two witnesses.

First, Dr. John Doe Number One testified that the way he inserts a cannula inside the calvarium to evacuate the calvarium after the fetus has been dismembered is by "serendipity." See Joint Appendix at 618-19. Second, Dr. George Goler testified that with the D & X procedure "it's a purposeful entrance into the skull. The other way, it's happenstance, in concurrence with a crushing of the skull." Id. at 696. Shortly after this statement, however, Dr. Goler agreed that during a D & E procedure, suction typically must be used to evacuate the skull contents in order to diminish the size of the head. See id. at 697. Moreover, after reviewing the testimony, we believe that Dr. Doe Number One meant that whether he accomplishes purposeful insertion of the suction device into the skull is happenstance. Earlier in his testimony, Dr. Doe Number One stated that it "would be my intent" to purposely insert a suction device into the skull to remove its contents. Id. at 607. Furthermore, when asked about how he employs suctioning during the D & E procedure, he testified

that his "goal" would be to have "the tip of the suction curette . . . impinge upon the calvarium, or head, that you at that point are suctioning out the intracranial contents. This will collapse the head." Id. at 598. Similarly, Dr. Mary Campbell testified that in doing a D & E procedure, the physician's goal is to insert a suction device into the cranium in order to remove the cranial matter and reduce the size of the skull, but that a physician may not be able to tell whether he or she has accomplished this goal, even with sonographic guidance. See id. 659-60. We believe the record amply supports the District Court's and our conclusion that the D & E procedure can entail purposely inserting a suctioning device into the skull in order to empty the brain contents.[10]

Finally, the Act's exception for "the suction curettage procedure of abortion and the suction aspiration procedure of abortion" does not include the D & E procedure. The Act does not define either of these procedures. "In the absence of . . . a definition, we construe a statutory term in accordance with its ordinary or natural meaning." FDIC v. Meyer, 510 U.S. 471, 476, 114 S. Ct. 996, 127 L.Ed.2d 308 (1994). The evidence in this case establishes that physicians--the persons for whom the terms have common meaning--understand a suction curettage

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[10]In fact, since the Act bans "attempts" to perform the D & X procedure, i.e. attempts to terminate a pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain, the Act further implicates the D & E procedure, since the record shows that in performing a D & E procedure, many physicians try to insert a suction device into the skull in order to remove its contents and achieve compression, but they are not always successful.

or aspiration[11] and a D & E to be two different abortion procedures. The suction curettage procedure is almost exclusively a first trimester procedure, whereas the D & E procedure is performed in the second trimester. In the second trimester, suction alone is often insufficient to remove the fetus. Although D & E includes suction curettage, it is a step in a process that entails additional instruments, namely forceps, and additional actions, namely dismemberment.

We conclude that the Act's definition of the prohibited abortion method includes both the D & E and D & X procedures. The Act therefore bans the use of both the D & E and D & X procedures. We next consider the implications of such a ban.

3. Undue Burden Analysis

In one pre-Casey case, the Supreme Court considered a ban on an abortion procedure. In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75-79, 96 S. Ct. 2831, 49 L.Ed.2d 788 (1976), the Supreme Court considered the constitutionality of a ban on the use of saline amniocentesis as a method of abortion after the first twelve weeks of pregnancy. Under Roe, which governed Danforth, a State could regulate abortion during the second trimester in ways reasonably related to the mother's health. See Roe, 410 U.S. at 163-64. The Danforth plaintiffs challenged the ban on the ground that it operated to preclude virtually all abortions after the first trimester, because a substantial percentage of all abortions performed in the United States after the first trimester, around 70% according to testimony, were effected through the procedure of saline amniocentesis. See Danforth,

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[11]As we have already indicated, suction curettage and suction aspiration are used interchangeably to describe the same procedure. See supra note 7.

428 U.S. at 76. The Court struck down the regulation because it would inhibit the vast majority of abortions after the first twelve weeks of pregnancy and would force a woman to undergo an abortion method more dangerous to her health. Id. at 77-79.

Although Roe 's second trimester standard allowed for fewer constitutional abortion regulations than does Casey 's undue burden standard, it follows that a statute which bans a common abortion procedure would constitute an undue burden. An abortion regulation that inhibits the vast majority of second trimester abortions would clearly have the effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion. Therefore, the Court's analysis in Danforth is consistent with Casey 's undue burden standard and thus provides us with some guidance in this matter.

Because the definition of the banned procedure includes the D & E procedure, the most common method of abortion in the second trimester, the Act's prohibition on the D & X procedure has the effect "of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Casey, 505 U.S. at 877. It does not matter that the D & E procedure typically is not performed late in the second trimester, when use of the D & X procedure is more common,[12] because the State may prosecute physicians who perform the D & E procedure at any time under the Act's definition of the banned procedure, which contains no temporal limitations. In

[12]The D & E procedure is difficult to perform at twenty weeks and beyond because the toughness of the fetal tissue makes dismemberment difficult. See Joint Appendix at 222. Therefore, physicians typically use the induction method to perform a later second trimester abortion. Essentially, an induction method of abortion entails inducing labor, resulting in the eventual expulsion of the fetus from the woman's uterus.

other words, the definition of the banned procedure in no way limits its application to late second trimester abortions. As in Danforth, the Act bans the most commonly used second trimester procedure and therefore is an unconstitutional burden on a woman's right to choose to have an abortion.

Appellants argue that the affirmative defense provision eliminates any concern that the ban might restrict a woman's access to a D & X procedure in circumstances where other procedures are not safe. The Act provides as an affirmative defense that a charged physician may present prima facie evidence that all other abortion procedures would pose a greater risk to the health of the pregnant woman than the risk posed by the D & X procedure. See Ohio Rev.Code ann. § 2919.15(C). This affirmative defense does not affect our analysis, however. The undue burden posed by the Act lies in the fact that the Act bans the most common second trimester procedure. The affirmative defense does not effectively remove that obstacle.[13]

[13]The abortion statute in Simopoulos v. Virginia, 462 U.S. 506, 510, 103 S. Ct. 2532, 76 L.Ed.2d 755 (1983), relied upon by the dissent on page 52, differs from the statute here in that that statute shifted the burden of proof to the state after the doctor raised the affirmative defense. Here the burden remains on the defendant to prove the defense. The state need only prove that some other available abortion procedure would not pose a greater risk to the health of the pregnant woman than the risk posed by the D & X procedure performed or attempted to be performed by the doctor charged. Whether the doctor knew of the alternative method or was trained to perform it or reasonably believed it posed a greater risk would not avail the doctor.

4. Post-Viability Application of the Ban

The undue burden standard applies only to pre-viability abortion regulations. See Casey, 505 U.S. at 877 ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." (emphasis added)). However, the State banned the performance of the D & X procedure "upon a pregnant woman" without reference to viability, and the record reveals that the procedure may be performed post-viability. Indeed, the District Court found that plaintiff Haskell has standing to challenge the Act's post-viability provisions, because he performs D & X procedures up through the twenty-fourth week of pregnancy and may be unable to rebut the presumption of viability in certain cases. See 911 F. Supp. at 1058-59. Because a State can proscribe all abortions post-viability, when not required for the life and health of the mother, we will assume arguendo that a State could restrict the abortion procedures performed post-viability, as long as abortions were still available to protect the life and health of the mother. Therefore, we must determine whether the post-viability ban on the D & X procedure is severable from the pre-viability ban on the D & X procedure.[14]

Severability is a matter of state law. Leavitt v. Jane L., --- U.S. ----, ----, 116 S. Ct. 2068, 2069, 135 L.Ed.2d 443

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[14]We note that striking down the entire D & X ban on the ground that it poses an undue burden would be consistent with Casey, in which the plurality analyzed provisions with application before viability under the undue burden standard even though those provisions were not specifically limited to pre-viability abortions while two additional justices would apply a broader standard. See Casey, 505 U.S. at 879-901.

(1996) (per curiam). The Act does not contain a severability provision. However, § 1.50 of Ohio's Revised Code provides that statutory provisions are presumptively severable:

> If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.

Ohio Rev.Code Ann. § 1.50 (Anderson 1990). The Supreme Court of Ohio explained recently that "[i]n order to sever a portion of a statute, we must first find that such severance will not fundamentally disrupt the statutory scheme of which the unconstitutional provision is a part." State ex rel. Maurer v. Maurer, 71 Ohio St.3d 513, 644 N.E.2d 369, 377 (Ohio 1994). More specifically, Ohio courts employ the following test for determining whether an unconstitutional provision may in fact be severed:

> "(1) Are the constitutional and the unconstitutional parts capable of separation so that each may read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?"

Id. (quoting Geiger v. Geiger, 117 Ohio St. 451, 160 NE 28, 33 (Ohio 1927)).

We conclude that under Ohio law, the ban on the use of the D & X procedure post-viability cannot be severed from the unconstitutional portion of the ban. We assume that the Ohio General Assembly would prefer a ban on the use of the D & X procedure post-viability as opposed to no ban at all. See H 135, § 3, 121 Gen. Ass. (Ohio 1995) (declaring the legislature's intent is to "prevent the unnecessary use of a specific procedure used in performing an abortion"). However, the language of the ban simply makes it not susceptible to severance. Post-viability application of the ban cannot be separated from pre-viability application of the ban so that it may stand alone. There is no clause or word dealing with post-viability application of the ban. We essentially would have to rewrite the Act in order to create a provision which could stand by itself. This we cannot do. Accordingly, the entire ban on the D & X procedure must be struck down.

5. Conclusion

We hold that the Act's ban on the D & X procedure is unconstitutional because the definition of the procedure encompasses the more commonly employed D & E procedure, and thereby places a substantial obstacle in the path of women seeking pre-viability abortions. The ban's application post-viability cannot be severed. Accordingly, the entire ban is unconstitutional.

D. Post-Viability Ban and Regulations

1. Introduction

The Casey Court "reaffirm[ed] Roe 's holding that 'subsequent to viability, the State in promoting its interest in the

potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.' " 505 U.S. at 879 (quoting Roe, 410 U.S. at 164-65) (emphasis added).[15] In Casey, the Court began its analysis of the statute's constitutionality by considering the statute's definition of medical emergency, because it was "central to the operation of various other requirements." Id. The Casey plaintiffs challenged the constitutionality of the medical emergency exception, arguing that it foreclosed the possibility of an immediate abortion despite some significant health risks. Id. at 879-80. The Court explained that "[i]f the contention were correct, we would be required to invalidate the restrictive operation of the provision, for the essential holding of Roe forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." Id. at 880. Indeed, "it could be argued that the freedom of a woman to decide whether to terminate her pregnancy for health reasons does in fact lie at the core of the constitutional liberty identified in [Roe]." Harris v. McRae, 448 U.S. 297, 316 (1980), cited in Casey, 505 U.S. at 880. Thus, any abortion regulation that might delay an abortion must contain a valid medical emergency exception. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 699 (3d Cir.1991), aff'd in part and rev'd in part, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992). Moreover, any regulation that prevents post-viability abortions must contain a valid medical necessity exception. See Casey, 505 U.S. at 879.

With regard to the medical necessity exception to the post-viability abortion ban, the District Court held that the definition of "serious risk of the substantial and irreversible

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[15]See footnote 4.

impairment of a major bodily function," found in both the medical necessity and medical emergency exceptions, was unconstitutional because it limited the performance of post-viability abortions to those situations in which a woman's physical health was threatened, and thereby impermissibly limited the physician's discretion to determine what measures were necessary to preserve her health, including mental health. See 911 F. Supp. at 1078-81. With regard to the medical emergency exception to the post-viability abortion regulations, the court held that the definition of "medical emergency" was unconstitutional because (1) both the definition and the criminal and civil liability provisions lacked scienter requirements and (2) the requirement that a physician's determination be objectively reasonable to other physicians would chill the performance of post-viability abortions where, in the physician's own best judgment, an abortion is necessary to preserve the life or health of the mother. See Id. at 1081-87.

We conclude that the medical necessity and medical emergency provisions are unconstitutionally vague, because they lack scienter requirements. Because the constitutionality of the post-viability regulations depends upon the constitutionality of these two provisions, all of the post-viability regulations must be struck down.

2. Lack of Scienter Requirement

The term "scienter" means "knowingly" and is used to signify a defendant's guilty knowledge. Black's Law Dictionary 1345 (6th ed.1990). It requires that a defendant have some degree of guilty knowledge or culpability in order to be found criminally liable for some conduct. Statutes imposing criminal liability without a mental culpability requirement are generally disfavored. See Staples v. United States, 511 U.S. 600, 605-06, 114 S. Ct. 1793, 128 L.Ed.2d 608 (1994).

The Act's "medical emergency" definition requires the physician to determine "in good faith and in the exercise of reasonable medical judgment" whether an emergency exists. Ohio Rev.Code Ann. § 2919.16(F). Similarly, the medical necessity exception to the post-viability ban requires that the physician determine "in good faith and in the exercise of reasonable medical judgment" that the abortion is necessary. See Id. § 2919.17(A)(1). Thus, both of these provisions contain subjective and objective elements in that a physician must believe that the abortion is necessary and his belief must be objectively reasonable to other physicians. This dual standard as written contains no scienter requirement. Therefore, a physician may act in good faith and yet still be held criminally and civilly liable if, after the fact, other physicians determine that the physician's medical judgment was not reasonable. In other words, a physician need not act wilfully or recklessly in determining whether a medical emergency or medical necessity exists in order to be held criminally or civilly liable; rather, under the Act, physicians face liability even if they act in good faith according to their own best medical judgment.

In Colautti v. Franklin, 439 U.S. 379, 390-97, 99 S. Ct. 675, 58 L.Ed.2d 596 (1979), the Court considered the constitutionality of a Pennsylvania abortion law that required every person who performed or induced an abortion to make a determination, "based on his experience, judgment or professional competence," that the fetus was not viable. If that person determined that the fetus was viable, or "if there [was] sufficient reason to believe that the fetus [might] be viable," then the person had to adhere to a prescribed standard of care. The Court found that it was unclear whether the statute imposed a purely subjective standard, or whether it imposed a mixed subjective and objective standard. See Id. at 391. Therefore, the Court held that the provision was unconstitutionally vague. See Id. at 393-94. The Court did not consider whether a mixed standard would be unconstitutional,

but it did conclude that the statute did not contain a scienter requirement. See Id. at 394 & n. 12. "Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more that 'a trap for those who act in good faith.' " Id. at 395 (quoting United States v. Ragen, 314 U.S. 513, 524, 62 S. Ct. 374, 86 L.Ed. 383 (1942)).[16] Moreover, the Court explained:

> The perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself. As the record in this case indicates, a physician determines whether or not a fetus is viable after considering a number of variables.... Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty.... In the face of these uncertainties, it is not unlikely that experts will disagree.... The prospect of such disagreement, in conjunction with a statute imposing strict civil and criminal liability for an erroneous determination of viability, could have a profound chilling effect on the willingness of

[16]Appellants argue that reasonableness is an adequate standard, quoting the following from Ragen, 314 U.S. at 523: "The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." However, the Ragen Court found that scienter was an essential element of the offense involved and that therefore "[o]n no construction can the statutory provisions here involved become a trap for those who act in good faith." Id. at 524.

> physicians to perform abortions ... in the manner indicated by their best medical judgment.

Id. at 395-96 (footnotes omitted)

Because the Colautti Court found the viability-determination provision void on its face, it did not decide whether, under a properly worded statute, a finding of bad faith or some other scienter would be required before a physician could be held criminally responsible for an erroneous viability determination. Id. at 396. Nevertheless, we find Colautti strongly indicative of the Court's view that in this area of the law, scienter requirements are particularly important. The determination of whether a medical emergency or necessity exists, like the determination of whether a fetus is viable, is fraught with uncertainty and susceptible to being subsequently disputed by others. Moreover, the lack of scienter is compounded by the fact that this Act requires that a physician meet both an objective and a subjective standard in order to avoid liability. While we need not decide whether employment of an objective standard with a scienter requirement would be constitutional, an objective standard without one is especially troublesome in the abortion context. In an area as controversial as abortion, the need for a scienter requirement is, as the Supreme Court pointed out, particularly important. In this area where there is such disagreement, it is unlikely that the prosecution could not find a physician willing to testify that the physician did not act reasonably. Under the Act, a physician who performs a post-viability abortion under either the medical emergency or medical necessity exception may be held liable, even if the physician believed he or she was acting reasonably, and in accordance with his or her best medical judgment, as long as others later decide that the physician's actions were nonetheless unreasonable. The objective standard combined with strict liability for even good faith determinations, "could

have a profound chilling effect on the willingness of physicians to perform abortions," Colautti, 439 U.S. at 396, when abortions are constitutionally permitted post-viability, i.e. when the woman's health or life is threatened. The uncertainty induced by this statute therefore threatens to inhibit the exercise of constitutionally protected rights. S. Ct. Id. at 391 (citing Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972)). Thus, the combination of the objective and subjective standards without a scienter requirement renders these exceptions unconstitutionally vague, because physicians cannot know the standard under which their conduct will ultimately be judged.

Two decisions of the Eighth Circuit support our conclusion in this case. In Fargo Women's Health Organ. v. Schafer, 18 F.3d 526, 534-35 (8th Cir.1994), the Eighth Circuit held constitutional a medical emergency provision in a North Dakota abortion law. The law required the physician to rely on his or her "best clinical judgment" in determining whether a condition constitutes a medical emergency. See Id. at 534. The court found that this standard was not vague and that the law contained a scienter requirement that prevented a vagueness finding. See Id. at 534-35. Although the law itself did not specify a culpability standard, the court found that North Dakota law mandated that a requirement of willfulness be imported into the statute. See Id. "This strict scienter requirement, which adequately notifies physicians that certain conduct is prohibited, is an additional basis for saving the statute from the Organization's vagueness challenge." Id. at 535 (citing Colautti, 439 U.S. 395).

Subsequently, in Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1463-67 (8th Cir.1995), the Eighth Circuit considered the constitutionality of the civil-damages and criminal-penalty provisions of a South Dakota abortion law. The court found that neither provision

contained a scienter requirement. Id. at 1463. It then determined that the South Dakota courts would not import a scienter requirement into the Act. See Id. at 1464-66. It thus held that, "without a scienter requirement, this strict criminal-liability statute will have a 'profound chilling effect on the willingness of physicians to perform abortions' " and would create an undue burden. See Id. at 1465 (quoting Colautti, 439 U.S. at 396); see also Id. at 1467 (striking down civil-penalty provision on same ground).

The issues presented in this case are more closely aligned with those in Colautti and Miller, than those in Schafer. Unlike North Dakota law, Ohio law does not provide for the importation of a scienter requirement in this case.[17] Without a scienter requirement, the Act does not adequately notify a physician that certain conduct is prohibited; rather, a physician may be held criminally and civilly liable for adhering to his or her own best medical judgment. As in Colautti and Miller, this lack of scienter will have a profound chilling effect on the willingness of physicians to perform abortions. Moreover, this chilling effect is exacerbated in this case because of the dual standard included in the Act.[18] A physician simply does not

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[17]The District Court concluded that Ohio courts would not import a scienter requirement into the Act. See 911 F. Supp. at 1085-87. Appellants do not dispute this finding on appeal.

[18]Appellants argue that a chill analysis in the post-viability context is inappropriate. We disagree. As we have already suggested, see supra part II.B.2, a chill effect in the post-viability context has significant constitutional implications because of a woman's predominant right to protect her life and health. Additionally, general standards governing vagueness challenges suggest that a statute with vagueness problems that could chill constitutional freedoms should be held unconstitutionally vague. See Colautti, 439 U.S. at 391;

know against which standard his conduct will be tested and his liability determined.

Appellants argue that the Act contains a scienter requirement for the medical necessity exception, because § 2919.17(A) provides that "[n]o person shall purposely perform or induce or attempt to perform or induce an abortion." Similarly, they argue that the medical emergency exception contains a scienter requirement because § 2919.17(B) provides that "[n]o person shall purposely perform or induce or attempt to perform or induce an abortion." The scienter requirement in both of these sections, however, goes to the performance of the abortion, not to the determination of medical necessity or medical emergency. In other words, if a physician were performing a non-abortion operative procedure on a woman and accidentally caused the fetus to be aborted, the physician would not violate the Act. The problem here is that the Act does not require scienter in the physician's determination of medical necessity and medical emergency. Appellants' argument therefore has no merit.

Thus, we conclude that the medical emergency and medical necessity exceptions are unconstitutional. Accordingly, we hold unconstitutional the Act's post-viability ban and regulations. While we need not consider the constitutionality of the other post-viability abortion regulations, because their validity depends upon the constitutionality of the provisions, we do address the lack of mental health exception

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Springfield Armory, Inc. v. City of Columbus, 29 F.2d 250, 251-52 (6th Cir.1994). Since we have already held that Salerno does not apply in the abortion context, it is enough that the statute may be unconstitutionally applied to a large fraction of women for whom the law is relevant, namely those who have a medical need for a post-viability abortion.

for post-viability since it was extensively briefed and argued. Further, if the statute is amended to meet the deficiencies found here, this issue will still remain.

The District Court also held the statute unconstitutional in that it made no provision for post-viability abortions where there was serious risk of the substantial and irreversible impairment of the pregnant woman's mental health.

The medical necessity exception to the post-viability abortion ban provides that an abortion may be performed in order to avert the death of the pregnant woman, or to avoid a "serious risk of the substantial and irreversible impairment of a major bodily function." See Ohio Rev. Code Ann. §§ 2919.16(F), 2919.17(A)(1). The statute defines a "serious risk of the substantial and irreversible impairment of a major bodily function" as follows:

> [A]ny medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function, including, but not limited to, the following conditions:
>
> (1) Pre-eclampsia;
> (2) Inevitable abortion;
> (3) Prematurely ruptured membrane;
> (4) Diabetes;
> (5) Multiple sclerosis.

Id. § 2919.16(J). On its face, this definition appears to be limited to physical health risks, as opposed to mental health risks. Indeed, defendants asserted at oral argument that the

definition should be construed as limited to physical health conditions.

In the Act, the General Assembly declared that, in using the phrase "serious risk of the substantial and irreversible impairment of a major bodily function" in §§ 2919.16 and 2919.17, "it is the intent of the General Assembly that the phrase be construed according to the interpretation given to that phrase in Planned Parenthood v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 2822, 120 L.Ed.2d 674 (1992), and Planned Parenthood v. Casey, 947 F.2d 682, 699- 702 (3d Cir.1991)." H. 135, § 4, 121st Gen. Ass. (Ohio 1995). Defendants argue that the Supreme Court in Casey upheld a substantially identical maternal health exception, as construed by the Third Circuit, and that since the Act's provision is to be similarly construed, it is also constitutional. Plaintiffs counter that (1) the challenged definition in Casey was upheld because the Third Circuit had broadly construed it as "not in any way pos[ing] a significant threat to the life or health of a woman," Casey, 505 U.S. at 880, and "health" includes mental as well as physical health, and (2) the Casey definition cannot be compared to the one in this case because in Casey the definition created an exception to the delays associated with the twenty-four-hour waiting period and parental consent provisions while the post-viability ban prevents all post-viability abortions. Although we agree that the definition in Casey was clearly limited to physical health risks, we conclude that Casey is distinguishable and that the Act unconstitutionally limits the performance of post-viability abortions to those cases in which a pregnant woman's physical health is threatened.

Casey does suggest that the Act's definition of "serious risk of the substantial and irreversible impairment of a major bodily function" should be interpreted as limited to physical health conditions and, moreover, is constitutional. The dispute in Casey was whether the phrase "serious risk" included

pre-eclampsia, inevitable abortion, and premature ruptured membrane.[19] See Casey, 947 F.2d 682, 699-702 (3d Cir.1991). The district court in that case had declared the definition unconstitutionally narrow because these three conditions could pose a serious threat to a woman's health without immediately creating a serious risk of substantial and irreversible impairment of a major bodily function. See Casey, 744 F. Supp. 1323, 1377- 78 (E.D. Pa.1990). After discussing these three medical conditions, the court of appeals concluded that "serious risk" should be construed to include such conditions. More specifically, the court found that while the wording of the provision did not cover negligible risks to life or health or significant risks of only transient health problems, it should cover conditions that could lead to death or permanent injury. See Casey, 947 F.2d at 701. This "broad" construction, however, was clearly limited to "physically threatening emergencies." See id. at 702.

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[19]The Pennsylvania statute defined "medical emergency" as:

> That condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

Casey, 505 U.S. at 879 (quoting 18 Pa. Cons. Stat. § 3203 (1990)).

The Supreme Court in Casey deferred to the appellate court's construction of the medical emergency provision, quoting the following statement from that court's decision: "[W]e read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of the mother." 505 U.S at 880 (quoting 947 F.2d at 701). Thus, plaintiffs here argue that the Court upheld the challenged definition in Casey, because the Third Circuit's broad construction ensured that significant threats to the life or health of a woman would be covered. But, as we have seen, the Third Circuit's "broad" construction was limited to physical conditions. Indeed, the court in conclusion stated: "The essence of the definition ... is that it allows a woman and her doctors to forego many of the Act's requirements when there is a medical emergency to the woman's physical health, and that includes where a woman has symptoms of preeclampsia, inevitable abortion, or prematurely ruptured membrane." 947 F.2d at 701 (emphasis added). The Act in this case expressly includes these conditions in its nonexhaustive list of covered physical health risks.

Nevertheless, this case is distinguishable from Casey. Here, we are faced with a regulation that bans post-viability abortions, while in Casey the Court was faced with a regulation that only delayed abortions. In upholding the medical emergency exception, the Casey Court was saying that in the pre-viability context, the medical emergency exception did not place a substantial obstacle in the path of a woman seeking an abortion. See 505 U.S. at 880 ("[A]s construed by the Court of Appeals, the medical emergency definition imposes no undue burden on a woman's abortion right."). Importantly, a woman would still be free to choose to have an abortion. Although the State may prohibit post-viability abortions--i.e., the undue burden standard is inapplicable--it must continue to permit abortions "where it is necessary, in appropriate medical

judgment, for the preservation of the life or health of the mother." Id. at 879. Therefore, we reject defendants' reliance on Casey for support of its argument that the Act's medical necessity exception is constitutional.

Determining whether a maternal health exception is constitutional when it is limited to physical health problems depends upon what the Supreme Court means by "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." At least two Supreme Court cases address some of the words in this phrase. The main case, and the one upon which the District Court relied, is Doe v. Bolton, 410 U.S. 179 (1973), which was decided the same day as Roe, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147. In Doe, the plaintiffs challenged the constitutionality of a Georgia statute which made it a crime for a physician to perform an abortion except when it was "based upon his best clinical judgment that an abortion is necessary." Doe, 410 U.S. at 191. The plaintiffs argued that the word "necessary" was unconstitutionally vague because it did not warn physicians of what conduct was proscribed. Id. The Court found that United States v. Vuitch, 402 U.S. 62, 71-72, 91 S. Ct. 1294, 28 L.Ed.2d 601 (1971) controlled. Id. at 191-92. In Vuitch, a vagueness issue was raised with respect to a statute which made abortions criminal "unless the same were done as necessary for the preservation of the mother's life or health." Id. at 191. The statute was construed as bearing upon psychological as well as physical well-being, and "this being so, the [Vuitch] Court concluded that the term 'health' presented no problem of vagueness," because physicians routinely make such judgments. Id. at 191-92. Similarly, the Doe Court found, whether an abortion is "necessary" is a professional judgment that physicians routinely make. Id. The Doe Court then stated:

> [M]edical judgment may be exercised in the light of all factors--physical, emotional,

> psychological, familial, and the woman's age--relevant to the well- being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.

Id. (emphasis added).

The Court also has emphasized the importance of giving the physician discretion to decide whether an abortion is necessary. In Colautti v. Franklin, 439 U.S. 379, 99 S. Ct. 675, 58 L.Ed.2d 596 (1979), the Court held unconstitutionally vague the viability-determination requirement in a Pennsylvania law. Specifically, the challenged provision required every person who performed or induced an abortion to make a determination, "based on his experience, judgment or professional competence," that the fetus was not viable; if such person determined that the fetus was viable, or if "there [wa]s sufficient reason to believe that the fetus may be viable," then the person had to adhere to a prescribed standard of care. Id. at 391. It was unclear whether the statute contained a purely subjective standard or whether it imposed a mixed subjective and objective standard. Id. The Court suggested, however, that it favored providing broad discretion to physicians to make determinations as to "medical necessity" in the abortion context:

> The contested provisions in [Doe and Vuitch] had been interpreted to allow the physician to make his determination in the light of all attendant circumstances--psychological and emotional as well as physical-- that might be relevant to the well-being of the patient. The present statute does not afford broad discretion to the physician.

Id. at 394 (emphasis added).

The issue whether a State may ban post-viability abortions except where necessary to preserve the woman's physical health, even if carrying the fetus to term would cause the woman to suffer severe mental or emotional harm, is a question of first impression for this Circuit.[20] We believe the

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[20]In A Woman's Choice-East Side Women's Clinic v. Newman, 904 F. Supp. 1434, 1466-74 (S.D. Ind.1995), a federal district court considered the constitutionality of an Indiana statute that allowed abortions where, inter alia, a delay would create "serious risk of substantial and irreversible impairments of a major bodily function," Ind. Code. Ann. § 16-18-2-223.5 (West Supp.1996). The court found that the plaintiffs had a reasonable likelihood of prevailing on the merits of their claim that the medical emergency exception was unconstitutionally narrow, in part because the reference to "major bodily function" appeared to exclude consideration of a woman's mental and emotional health. See id. at 1467-68. The court granted a preliminary injunction, but it also decided to certify a number of questions of statutory construction to the Supreme Court of Indiana, including the following: "Does the [medical emergency] definition except a woman from compliance with [the law's mandatory disclosure and waiting period requirements] when such compliance threatens to cause severe psychological harm to the woman?" See A Woman's Choice-East Side Women's Clinic v. Newman, 671 N.E.2d 104 (Ind. 1996). The state court answered "yes," noting that this exception would not apply to temporary, psychological harms because the court also held in the case that the statute did not apply to other "severe-but-temporary" medical conditions. Id. at 111. The court further explained that the statute's "bodily function" language encompassed mental health, because "[m]ental processes are done by the brain, of course, and the brain is an organ, so mental processes are bodily functions even

Court will hold, despite its decision in Casey, that a woman has the right to obtain a post-viability abortion if carrying a fetus to term would cause severe non-temporary mental and emotional harm. Doe and Vuitch-- which both involved regulations essentially prohibiting, as opposed to delaying, abortions--strongly suggest that a State must provide a maternal health exception to an abortion ban that encompasses situations where a woman would suffer severe mental or emotional harm if she were unable to obtain an abortion. Moreover, Roe and Doe were decided on the same day and "are to be read together." Roe, 410 U.S. at 165. Therefore, Roe 's prohibition on state regulation when an abortion is necessary for the "preservation of the life or health of the mother," Id., must be read in the context of the concept of health discussed in Doe, see Id. at 191-92. Accordingly, the Act's medical necessity exception is unconstitutional, because it does not allow post-viability abortions where necessary to prevent a serious non- temporary threat to a pregnant woman's mental health. Additionally, drawing on Colautti, we find that the Act impermissibly limits the physician's discretion to determine whether an abortion is necessary to preserve the woman's health, because it limits the physician's consideration to physical health conditions. See Colautti, 439 U.S. at 387 (stating that the Doe Court found it "critical" that, in deciding whether an abortion was necessary, the physician's judgment "may be exercised in the light of all factors--physical, emotional, psychological, familial, and the woman's age--relevant to the well-being of the patient").

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though they are not mechanical or chemical." Id. Here, the there is no question that the Act's definition applies only to physical health conditions, since the Ohio legislature intended the Act's definition to have the same scope as the definition at issue in Casey.

Defendants argue that a broad maternal health exception will render meaningless the State's compelling interest in protecting fetal life and its right to actually proscribe post-viability abortions. We recognize the problems associated with a mental health exception. However, we emphasize that we are holding that a maternal health exception must encompass severe irreversible risks of mental and emotional harm. The State's substantial interest in potential life must be reconciled with the woman's constitutional right to protect her own life and health. We believe that in order to reconcile these important interests, the Constitution requires that if the State chooses to proscribe post-viability abortions, it must provide a health exception that includes situations where a woman is faced with the risk of severe psychological or emotional injury which may be irreversible. We therefore hold that the Act's restrictive medical necessity exceptions is unconstitutional.

E. Prosecutor's Appeal

The Montgomery County Prosecutor seeks dismissal, arguing that he is a nominal party, because his presence in the lawsuit was neither crucial to establish venue nor necessary to adjudicate the constitutionality of the Act. In the alternative, he asserts that the District Court erred in failing to join as necessary parties either the other prosecutors for counties in which plaintiff Haskell performs abortions or the remaining eighty-seven Ohio County Prosecutors. Finally, the prosecutor maintains that the District Court lacked jurisdiction by failing to join as necessary parties the other Ohio prosecutors.

The prosecutor sought dismissal during a chambers conference on November 6, 1995:

> Ms. Cohen: It seems to me that we're really not necessary to this lawsuit, and I am wondering if Al would like to voluntarily dismiss us.

The Court: I don't think. I think Al indicated at the beginning that you were joined only because you're the entity that would be filing the criminal charges.

Perhaps Al would be willing to voluntarily dismiss you ... if you would agree to be bound by any order of the Court, interlocutory and final, without being named as a party defendant.

First of all, would you agree to that, before I'll ask Al if that's satisfactory?

Ms. Cohen: We would not agree to that, Judge.

....

The Court: You're named, in effect, as a nominal party because of the plaintiff's request that I find the statute unconstitutional and enjoin its enforcement. And, by having you as a party to the lawsuit and a party to the injunction, if I hold the statute unconstitutional, you cannot begin a prosecution.

Joint Appendix at 883-86.

The prosecutor relies on Children's Healthcare is a Legal Duty, Inc. v. Deters, 894 F. Supp. 1129, 1131-32 (S.D. Ohio 1995), rev'd on other grounds, 92 F.3d 1412 (6th Cir. 1996), in which the district court held that the city and county prosecutors were unnecessary defendants in a lawsuit challenging the constitutionality of provisions of the Ohio Revised Code. The District Court dismissed the prosecutors, holding that the Attorney General would represent the interests of the State. This case is distinguishable, however, because in Children's Healthcare, the plaintiffs claimed that the

prosecutors had failed to prosecute actions that the state had deemed legal; in other words, the prosecutors had no reason to prosecute under the law. "The law makers not the law enforcers are the proper defendants in this type of suit." Id. at 1132. Thus, there was no danger of potential prosecution and no need to enjoin the prosecutor from charging the plaintiffs with a crime. Here, the prosecutors could charge plaintiff Haskell, who performs abortions in Montgomery County, with violating the Act.

In the appeal of Children's Healthcare, this Court held that the Eleventh Amendment barred the action against the Attorney General, because Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908), did not apply, and because the action did not fall with the Young exception because the plaintiffs did not seek to enjoin the enforcement of an allegedly unconstitutional statute. See 92 F.3d at 1416. We did not address the propriety of the dismissal of the prosecutors. However, we did cite favorably the district court's decision in Akron Cen. for Reprod. Health v. Rosen, 633 F. Supp. 1123, 1130 (N.D. Ohio 1986), aff'd on other grounds, 854 F.2d 852 (6th Cir. 1988), rev'd on other grounds, 497 U.S. 507 (1990) which dismissed the Ohio Governor and Attorney General because they had no connection in the enforcement of a statute while noting that enforcement was clearly delegated to the state's prosecuting attorneys. More relevant to this case is the district court's holding that the county and city prosecutors were proper defendants in a suit challenging the constitutionality of an abortion law. In that case, the two prosecutors named as defendants argued that the duty to defend the constitutionality of state statutes falls upon the state attorney general, and that therefore they should be dismissed. See 633 F. Supp. at 1128. The district court explained that the prosecutors still had a role in the action, because their statutorily defined duties demonstrated that they would be required to enforce the statute against the plaintiffs. Id. at

1128-29. "Accordingly, both [prosecutors] are proper parties to bear the injunctive relief requested by the plaintiffs. While they may understandably expect that the state will bear the costs of defending this litigation, they cannot be dismissed as defendants." Id. at 1129.

The prosecutor argues that he is unnecessary for the court to make a determination as to the Act's constitutionality. But as the District Court held, the prosecutor is necessary in terms of injunctive relief. If the District Court found the Act unconstitutional, as it did, the prosecutor would not have been bound by the injunction if he were not a party. Therefore, the District Court did not err in declining to dismiss the prosecutor.

The prosecutor did not raise his other two arguments relating to nonjoinder before the District Court. Therefore, before dismissing for failure to join indispensable parties, we should consider whether denying dismissal will have serious prejudicial effects on the non-joined parties. 7 Charles A. Wright et al., Federal Practice and Procedure, § 1609, at 140 n.27 (2d ed.1986). The prosecutor first argues that the other county prosecutors are necessary parties because without them plaintiffs' relief is inadequate in that other prosecutors in counties where plaintiff performs abortions are not bound by the injunction. This is plaintiffs' problem, however, and does not affect any of the Montgomery County Prosecutor's interests. Second, the prosecutor argues that joinder is necessary because the other prosecutors have a legally protected interest in the subject of the action, i.e., the constitutionality of the Act. We find that the Attorney General has vigorously defended the constitutionality of the Act. Apart from the issue of attorney's fees, we cannot see how the interests of the other county prosecutors can be considered different from those of the State at this point in the Act's history. We therefore conclude that dismissal for nonjoinder would be inappropriate and the District Court did not err in not joining the other prosecutors.

III. Conclusion

For the foregoing reasons, we AFFIRM.

DISSENT

BOGGS, Circuit Judge, dissenting.

In my view, Ohio's ban on the D & X procedure is constitutional. Therefore, I must dissent from the court's holding to the contrary. Likewise, I dissent from the majority's holding that the "medical necessity" and "medical emergency" provisions are unconstitutional because of their lack of a scienter requirement. Further, I believe that, to the extent that Casey requires a mental-health component to the required medical emergency exemption, the language in Casey incorporated by the Ohio legislature is sufficiently broad to encompass such a requirement. Because I believe the substance of Ohio's partial-birth abortion passes constitutional muster, I would not address the question whether the Sixth Circuit should now discount, in all abortion cases, the test for facial constitutional challenges stated by the Supreme Court in United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987).[1]

I

The regulation of abortions is one of the most controversial issues of our time. Normally, such controversial issues are left to the political arena, with each side fighting to win the electorate over to its view. The Supreme Court has reminded us time and again that, rather than reaching out to

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[1]I do not take issue with the conclusions expressed in Part II.E of the majority opinion.

strike down statutes that are arguably unconstitutional, the federal courts are to interpret statutes so as to avoid difficult constitutional questions where possible. See, e.g., Kent v. Dulles, 357 U.S. 116, 78 S. Ct. 1113, 2 L.Ed.2d 1204 (1958) (construing ambiguous federal statute to avoid First Amendment problem); Adams Fruit Co. v. Barrett, 494 U.S. 638, 647, 110 S. Ct. 1384, 108 L.Ed.2d 585 (1990) (construing ambiguous state statute to avoid preemption problem). The reason federal courts should only take up constitutional questions when required to do so is that, in a constitutional democracy, courts ought not to disturb the judgments of the democratically elected branches of government unless the constitutionality of those judgments is clearly in question. See generally Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4 (1996). It appears to me that the majority's opinion strains to interpret Ohio's partial-birth abortion statute so as to make the burden imposed by Ohio's ban on dilation-and-extraction ("D & X") abortions, and on most post-viability abortions, appear "undue" in violation of Planned Parenthood of Southeast Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992). As I hope to show, this interpretation is neither correct nor appropriate.

The abortion area, of course, has been largely constitutionalized, as the Supreme Court has made clear in a line of decisions starting with Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973). Some choices, however, remain within the state's legislative power. These choices have not always been well delineated by the Court, with the result that pro-life advocates continue to seek greater controls on abortion, while pro-choice advocates continue to push for complete constitutional protection of all abortion procedures. This has left us, as the body bound to interpret the Constitution and Supreme Court precedent, squarely in the middle. Our obligation, as an intermediate appellate court, is to apply faithfully the guidance handed down to us, neither unduly

expanding, nor capriciously contracting, the leeway properly reserved for democratic choice.

As I read the Supreme Court decisions, two principles relevant to today's case have been authoritatively decided: (1) a particular method of abortion can be banned, if such a ban does not create an "undue burden" on a woman's right to choose an abortion, see Casey, 505 U.S. at 880; and (2) post-viability abortions can be banned "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Id. at 879 (plurality opinion) (citation omitted).

At oral argument, counsel for the abortionists asserted, with commendable candor, their position that these principles, properly interpreted, pose no barrier to any woman seeking an abortion at any time for any purpose. Their logic is based on the continuing use of language such as "consultation with her doctor" and "appropriate medical judgment." In their view, the use of this language necessarily implies that any abortion that the mother will request or the doctor will perform must remain available, despite the two principles above. With regard to the first principle, the reasoning is that any statute prohibiting a mother from obtaining her preferred abortion procedure ipso facto places an "undue burden" on her right to choose an abortion.. With regard to principle two, counsel's logic is that any statute restricting a doctor's choice of abortion procedure automatically violates Casey 's "appropriate medical judgment" caveat.

But surely this proves too much. If this logic were correct -- and it was certainly pressed on the Court at the time of the Casey and Danforth decisions -- surely the Court would have said so, rather than setting up a maze that legislatures can in fact never successfully negotiate (despite the Court's apparent invitation to them to try). To adopt the plaintiffs'

position would be to assume that the Supreme Court is deeply dishonest rather than simply deeply divided. I choose not to believe that, and thus believe that the Court meant what it said in permitting state abortion regulations in certain contexts. We therefore must take it as a given that some post-viability abortions may be banned and that some methods of abortion can be banned generally.

The specific question we must address today thus is not whether Ohio can regulate abortion -- clearly it can -- but whether Ohio "got it right" in its effort constitutionally to regulate one particularly offensive abortion procedure. To put it differently, did Ohio, in its zeal to implement the political will of its citizens, sweep too broadly in regulating certain categories of abortion procedures, or are the plaintiffs here simply attempting, by a variety of artful stratagems, to prevent the Ohio legislature from exercising any powers over abortion? With respect to the Ohio legislature's attempt to ban the D & X procedure, I believe that Ohio got it right.

First, while the evidence presented to the district court supports its finding that the D & X procedure may pose less risk to some women in some cases than the available alternative procedures, see Women's Med. Prof. Corp. v. Voinovich, 911 F. Supp. 1051, 1068-71 (S.D.Ohio 1995), the district court has not found that the other procedures are unsafe or unavailable. Such a finding was crucial to the Supreme Court's decision in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75-77, 96 S. Ct. 2831, 49 L.Ed.2d 788 (1976). In Danforth, the Court struck down a ban on saline injection abortions based on evidence that showed that the saline method was the most commonly used method of abortion and that the proffered alternative method, prostaglandin suppositories, was not available to women at that time. In this case, by contrast, the district court made no finding that the D & X procedure is commonly used or that there are no other safe alternative

methods available to women in Ohio. In fact, it found to the contrary. See Voinovich, 911 F. Supp. at 1068-71.

Second, Danforth must be read in light of the later Casey decision. The Danforth Court relied on Roe 's formalistic trimester framework, under which Missouri's ban on saline abortions in the second trimester could be upheld only if based on the health interests of the mother. As the majority acknowledges, see supra at 9, Casey did away with the trimester framework, focusing instead on whether the regulation posed an "undue burden" on the woman's right to choose an abortion. See Casey, 505 U.S. at 880. The plurality opinion also emphasized the need to give more weight to a state's asserted interest in the potentiality of life. See id. at 875 ("Not all governmental intrusion is necessarily unwarranted; and that brings us to the other basic flaw in the trimester framework: even in Roe 's terms, in practice it undervalues the State's interest in the potential life within the woman."). Therefore, given this new framework, a finding that a procedure is simply "safer" in some instances is not sufficient. Rather, the district court would need to have found that the D & X method is the safer procedure in most circumstances, especially when confronted with such a rarely used procedure. See Danforth, 428 U.S. at 76.

If there is any doubt as to the constitutionality of Ohio's D & X ban standing by itself, it is resolved by the fact that the Ohio statute provides for an affirmative defense to liability for situations in which all other available abortion procedures pose a greater danger to the mother's health. It thus eliminates any concern that the law might restrict a woman's access to the D & X procedure in those actual circumstances where other procedures are not as safe. The fact that this exception is an affirmative defense does not undermine its constitutionality. See Simopoulos v. Virginia, 462 U.S. 506, 510, 103 S. Ct. 2532, 76 L.Ed.2d 755 (1983) (abortion statute was not

unconstitutionally applied to a physician on the asserted ground that the state failed to prove the lack of medical necessity for a second-trimester abortion since, under state law, the prosecution was not obligated to prove lack of medical necessity beyond a reasonable doubt until defendant invoked medical necessity as a defense). The majority's offhand dismissal of the significance of the affirmative defense provision, see supra at 26-27, is especially puzzling given the Supreme Court's repeated endorsement of criminal statutes placing the burden of raising a particular affirmative defense on the defendant. See, e.g., Engle v. Isaac, 456 U.S. 107, 120-21, and n. 20, 102 S. Ct. 1558, 71 L.Ed.2d 783 (1982); Mullaney v. Wilbur, 421 U.S. 684, 701- 03, 95 S. Ct. 1881, 44 L.Ed.2d 508, nn.28, 30, 31 (1975).

I believe that the majority, in dismissing the importance of the affirmative defense provision in the statute, has erroneously focused on an extreme case, accepting plaintiffs' argument that women would be required to bear an increased medical risk because the fear of prosecution will spur physicians to use alternative procedures even when the D & X procedure is the safest method. Such an extreme example, however, obscures the reality that all criminal laws chill conduct that is at the margins of legality. In any event, it is inappropriate for the majority to rely on such an extreme hypothetical case since the evidence shows that the D & X procedure is never medically indicated. The strongest finding the district court could make was that late in the second trimester of pregnancy the D & X procedure "does appear to have the potential of being safer than all other available abortion procedures." 911 F. Supp. at 1070. As the district court recognized, however, even this finding has never been scientifically proved. Voinovich, 911 F. Supp. at 1068-69 ("The Court acknowledges that if there were a statistical study,

published in a peer review journal, which demonstrated the benefits of the D & X procedure, this would make the asserted benefits more credible.").

One doctor testified that the D & X procedure is "essentially identical" to a procedure used and abandoned by the medical profession because it posed safety risks to the mother, including perforation of the uterus, injury to the cervix and/or vagina, and infection. Although the district court discounted this testimony because of advances in medicine (e.g., ultrasound), the safety of the D & X procedure nonetheless remains untested and undocumented. The only evidence suggesting that the D & X procedure is safe is an anecdotal report of a single surgeon, which has not been substantiated by other investigators nor even submitted to a peer-reviewed publication. In fact, the American Medical Association has taken a public stand against the procedure, supporting a federal ban on partial-birth abortions. On May 19, the AMA Board of Trustees issued a statement supporting then - pending federal legislation to outlaw the D & X procedure, stating that it "is a procedure which is never the only appropriate procedure and has no history in peer reviewed medical literature or in accepted medical practice development." This position later received the endorsement of the entire AMA House of Delegates. See 40 American Medical News, No. 25 (July 7, 1997).

The majority concludes in the alternative that the statute is unconstitutionally vague in that it would also effectively ban the more commonly used dilation and evacuation ("D & E") procedure. I do not believe this is so. Rather, I believe that the plaintiffs are attempting to create ambiguity where there is none. Such is the genius of a vagueness challenge because, in the extreme, words can always be said to be ambiguous. See, e.g., Frederick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 420 (1985) ("Ever since Macbeth mistakenly relied on the

linguistic precision of the witches' prophesy, people have been able to construct weird and fanciful instances in which even the clearest language breaks down.").

Plaintiffs seemed to concede at oral argument that had a different set of words been used in defining the D & X procedure the provision would have had identical effect, but been more difficult to challenge. Counsel, however, could not be pinned down as to any set of words that would, in his view, acceptably define the procedure. I believe this is because any set of words chosen by the Ohio legislature would have been challenged on vagueness grounds. But this type of argument (especially where, as here, the words chosen clearly define a procedure understood by doctors and laymen alike) proves too much.[2]

I believe that the definition of the D & X procedure makes clear the procedure subject to the ban. Only a procedure in which a physician terminates the pregnancy by "purposely inserting a suction device into the skull of a fetus to remove the brain" is banned by House Bill 135. And there is nothing from the legislative history to suggest that the legislators were attempting to deceive the electorate, the medical community, or the courts by wording the legislation in such a way as covertly to ban most second-trimester abortions through the effective ban of the commonly used D & E procedure. Rather, it appears that the Ohio legislature intended to only ban this one

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[2]Allowing such an argument to succeed would, if taken to the extreme, result in all laws being vague. Many perfectly valid criminal laws are less then perfectly specific hence the rule of lenity, which states that ambiguities in criminal statutes are to be construed in favor of the accused. United States v. R.L.C., 503 U.S. 291, 305-13, 112 S. Ct. 1329, 117 L.Ed.2d 559 (1992) (discussing rule of lenity).

procedure because it believed it to be a particularly heinous method of abortion.

Although the legislature might have been wise to choose language more closely resembling the federal legislation, which is discussed by the majority at footnote 8 of its opinion,[3] I believe the language chosen by the Ohio legislature sufficiently defines the procedure to give fair notice as to what is encompassed by the ban. The testimony at the hearing in the district court clearly demonstrates that doctors who perform abortions have no difficulty discerning the conduct prohibited by the statute. Moreover, I believe the D & E procedure does not satisfy the definition of the ban because it does not terminate the pregnancy by purposely inserting a suction device into the fetal skull to excavate the contents of the skull. Rather, any suctioning of the brain is only a byproduct

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[3]As explained above, I am confident that any language in this area, no matter how clear, will be challenged on vagueness grounds inasmuch as all language is potentially ambiguous. Plaintiffs in a challenge to Michigan legislation banning partial-birth abortions argued that the language in that statute, which mirrors the federal legislation language, is unconstitutionally vague because the statutory language does not provide physicians with adequate clear notice of the specific procedure or procedures proscribed by the law. A federal district court recently found that language unconstitutionally vague, noting that the term "partially vaginally delivers a living fetus" covers "the partial removal of a fetus while its heart is still beating, whether in whole or in part, [and thus] could outlaw conventional dilation and evacuation procedures in which the fetus is evacuated part by part, as well as intact D & E procedures." Evans v. Kelley, No. 97-CV-71246-DT, 1997 WL 471906, at *25 (E.D.Mich. July 31, 1997).

of the abortion procedure already performed, and is neither purposeful nor the means of terminating the pregnancy.

I am, however, in agreement with the majority's conclusion that the post-viability ban on the D & X procedure causes no constitutional violation. I find the severability issue moot, since, unlike the majority, I believe that the pre-viability ban on the D & X procedure causes no constitutional problem.

II

I also part company with the majority's holding that the "medical necessity" and "medical emergency" provisions are unconstitutional for their lack of a scienter requirement. I believe that the language the Ohio legislature used "provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will [of the legislature]. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." United States v. Petrillo, 332 U.S. 1, 7, 67 S. Ct. 1538, 91 L.Ed. 1877 (1947) (citation omitted). "The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." United States v. Ragen, 314 U.S. 513, 523, 62 S. Ct. 374, 86 L.Ed. 383 (1942). What the majority's argument fails to recognize is that a defendant subject to criminal liability is afforded considerable constitutional protections, including the requirement that the state prove guilt "beyond a reasonable doubt." In a close case, the "beyond a reasonable doubt" standard would provide protection against the abuses hypothesized by the majority.

Moreover, I believe that the majority's reliance on Colautti v. Franklin, 439 U.S. 379, 99 S. Ct. 675, 58 L.Ed.2d 596 (1979), for the proposition that a statute without a scienter requirement is vague is misplaced. The Supreme Court in Colautti specifically declined to decide whether "under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability." 439 U.S. at 396. Rather, the principle invoked by the Court in Colautti simply is that a scienter requirement can mitigate the vagueness of an otherwise vague law--not that the absence of a scienter requirement will "create" vagueness where it does not otherwise exists. See also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99, 102 S. Ct. 1186, 71 L.Ed.2d 362 (1982). And I do not believe there is anything vague, or even novel, about a statute prescribing a standard including components of good faith and reasonableness. For example, when a defendant raises a claim of self defense, he must show an honest belief that the imminent use of deadly force was necessary and that such belief was reasonable under the circumstances. See, e.g., Thomas v. Arn, 704 F.2d 865, 869 n. 5 (6th Cir.1983).

Even the three-Justice plurality in Casey recognized that the "life or health of the mother" exception may be invoked only when necessary "in appropriate medical judgment." See 505 U.S. at 879. It is difficult to see how a medical judgment can be deemed "appropriate" if it is, beyond a reasonable doubt, not a reasonable medical judgment. The majority's position would in essence constitutionalize a rule comparable to that adopted by the Supreme Court in Cheek v. United States, 498 U.S. 192, 111 S. Ct. 604, 112 L.Ed.2d 617 (1991), for tax cases. In that case, the Court interpreted the tax code to permit a taxpayer to defend against a charge that he willfully failed to pay taxes where he believed, in good faith, that he owed no taxes, even though his belief may have been unreasonable. See

id. at 201-02. I do not think the Constitution requires us to create a Cheek-like rule and hold that a doctor is exempt from liability simply because he believes, in good faith, that any childbirth not consented to by the mother will seriously damage her health.

Moreover, I am not persuaded by the majority's language that the lack of scienter is particularly troublesome in the abortion context because of the emotionally charged nature of the subject. See supra at 42-43. Such an argument fails to recognize what the law itself does recognize: that a jury will have to find beyond a reasonable doubt that the doctor failed to act "in good faith [or] in the exercise of reasonable medical judgment" when determining whether a medical emergency existed or whether there was a medical necessity for the abortion. Unlike the majority, I have faith that the jury system will not run amok. "If the jury system is to remain a part of our system of jurisprudence, the courts and litigants must have faith in the inherent honesty of our citizens in performing their duty as jurors. . . ." State v. Sheppard, 165 Ohio St. 293, 135 N.E.2d 340, 343 (Ohio 1956).

Moreover, even were I to accept the majority's view that the jury system may fail in the abortion context, I do not believe that simply changing the standard by which the physician is to be judged will cure the problem. If a jury and judge are bent on convicting a physician who performs late-term abortions because of distaste for the act, they will do so, no matter what standard is set out for them to follow. Determining whether a jury's verdict is supported by the evidence is our task as appellate judges and, I should think, a task preferable to taking the question out of the hands of juries before they have had a chance to serve their constitutional function.

III

Finally, I believe that to the extent Casey requires a medical necessity exemption that includes a mental-health component, see 505 U.S. at 879, the language in Casey incorporated by the Ohio legislature is sufficiently broad to encompass such a requirement.[4] Although the Supreme Court in Casey deferred to the Pennsylvania appellate court's construction of the medical emergency provision, which was specifically limited to physical conditions, the definition in Casey, which the Ohio legislature chose to adopt, does not in my opinion exclude a "serious non-temporary" threat that encompasses "severe risks of mental and emotional harm," language of which the majority would apparently approve. See supra at 44. Such phraseology is nothing more than a rewording of the language already found in Casey. It is hard to distinguish the majority's preferred "severe non-temporary" construction from the "serious risk of substantial and irreversible" language found in House Bill 135 and in Casey. Likewise, sufficiently severe "mental and emotional harm" can be encompassed by "impairment of a major bodily function." Although Ohio Rev. Code Ann. § 2919.16(J) specifically mentions only the physical conditions, of "Pre-eclampsia . . . Inevitable abortion . . . Prematurely ruptured membrane . . . Diabetes [and] Multiple sclerosis" in its definition of "a serious risk of the substantial and irreversible impairment of a major bodily function," this list is non-exhaustive, as the section specifically states that the valid emergency conditions are "not limited to" the list enumerated by the legislature. It is counterintuitive to say that sufficiently severe mental harm is not an impairment of a major bodily function; if anything, it

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[4]I say "to the extent" because the part of Casey in which the vitality of Roe and Doe (the cases relied upon by the majority, see supra at 40-44) is discussed drew the votes of only three Justices. See Casey, 505 U.S. at 869-79.

could be seen as an impairment of the most significant bodily function. But again my colleagues reach to construe the statute in its least favorable constitutional light. If the majority is unwilling to follow Justice Brandeis's advice in Ashwander v. TVA, 297 U.S. 288, 341, 56 S. Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring), that "courts must refrain from passing upon the constitutionality" of a statute "unless obliged to do so," at a minimum it would be prudent to wait for an authoritative statutory construction from an Ohio court. Cf. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938).

IV

My colleagues begin their opinion by holding that the rule stated in United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987), will no longer govern facial challenges to abortion statutes in this circuit. See supra at 10-17. In Salerno, the Supreme Court stated that facial challenges to the constitutionality of statutes (as distinct from challenges to particular applications of statutes) can only be sustained upon a showing that there is "no set of circumstances . . . under which the [statute] would be valid." Salerno, 481 U.S. at 745. Relying on language in Casey (itself a facial challenge) in which the three-Justice plurality noted that "in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion," 505 U.S. at 895, three federal appellate courts have held that Salerno has been effectively overruled and that facial challenges to abortion statutes need only demonstrate that a "large fraction" of statutory applications would be unconstitutional. See Jane L. v. Bangerter, 102 F.3d 1112, 1116 (10th Cir. 1996), cert. denied sub nom. Leavitt v. Jane L., --- U.S. ----, 117 S. Ct. 2453, 138 L.Ed.2d 211 (1997); Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1456-58 (8th Cir. 1995), cert. denied sub nom. Janklow v.

Planned Parenthood, Sioux Falls Clinic, --- U.S. ----, 116 S. Ct. 1582, 134 L.Ed.2d 679 (1996); Casey v. Planned Parenthood of Southeastern Pennsylvania, 14 F.3d 848, 863 n.21 (3d Cir.), stay denied, 510 U.S. 1309, 114 S. Ct. 909, 127 L.Ed.2d 352 (1994). On the other hand, one federal appellate court and four Justices of the Supreme Court have stated that Salerno remains the law in the abortion context as elsewhere. See Ada v. Guam Society of Obstetricians & Gynecologists, 506 U.S. 1011, 113 S. Ct. 633, 121 L.Ed.2d 564 (1992) (Scalia, J., joined by Rehnquist, C.J., and White, J., dissenting from denial of certiorari); Janklow v. Planned Parenthood, Sioux Falls Clinic, --- U.S. ----, ----, 116 S. Ct. 1582, 1584, 134 L.Ed.2d 679 (1996) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from denial of certiorari); Barnes v. Moore, 970 F.2d 12, 14 n.2 (5th Cir.), cert. denied, 506 U.S. 1021, 113 S. Ct. 656, 121 L.Ed.2d 582 (1992).

Because I believe that a proper construction of the Ohio statute at issue compels the conclusion that the statute is constitutional as a substantive matter, I see no reason for our circuit to wade into these cross-currents. Nonetheless, I note briefly a number of potential problems with my colleagues' resolution of the Salerno issue. First, the Salerno Court rested its holding on the long-recognized proposition that, except in the First Amendment context, facial challenges to statutes are disfavored. See Salerno, 481 U.S. at 2100 ("The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."). By taking the view that it is unconstitutional for a statute to chill the exercise of abortion rights the fear of a chilling effect being the basis for the overbreadth doctrine the majority today may unintentionally be taking the first step along a dangerous path along where, for example, FDA regulation of birth control devices could be subject to a facial challenge because they

could chill the right of married couples to obtain and use contraceptive products. Many valid laws regulate conduct that, at the margins, comes close to the boundaries of constitutionally protected activity; only in the First Amendment context has this fact been declared to have constitutional significance.

Second, to the extent that Casey announced a rule to replace Salerno 's requirement of a showing that no possible application of a statute could be constitutional, the rule is that a plaintiff may possibly succeed on a facial challenge by showing that a "large fraction of the cases in which" the challenged statute is relevant are likely to involve statutory applications creating an undue burden on the right to choose abortion. That manifestly cannot be shown here. The district court found that 95 percent of abortions in the United States are performed in the first 15 weeks of pregnancy, a period in which the D & X procedure is not used. See Voinovich, 911 F. Supp. at 1064. For 95 percent of abortion seekers, therefore, neither the D & X prohibition nor the post-viability abortion prohibition are a problem. Even within the small subgroup of women who seek an abortion sufficiently late in pregnancy to prefer a D & X, the fact that there are other reasonably safe alternatives available in most cases means that the D & X prohibition cannot be said to impose an unconstitutional burden on their right to choose abortion, even though it eliminates one of their several options. The only women whose constitutional rights genuinely seem to be at issue, then, are those few women who seek late second-trimester abortions and for whom D & X is the only safe procedure. Putting aside the fact that the Ohio statute provides an affirmative defense for these women and their doctors, this small subset of women cannot seriously be called a "large fraction" of women affected by the statute. For these reasons, I would leave the question of Salerno 's applicability for another day.

V

The deficiencies that the majority finds in the Ohio statute, and the changes that would apparently be necessary to remedy them in the majority's view, are matters of nuance, not of basic principle. If the views expressed by Judge Kennedy were accepted law, it seems to me that Ohio could change its language to meet this ruling and still accomplish, in my view, 99 (if not 100) percent, of what it reasonably thought it was accomplishing with the words that it did use.

However, clear guidance to state legislatures as to where they permissibly can impose abortion regulations appears not to be the real motivation of plaintiffs nor the likely result of cases such as ours. The post-Casey history of abortion litigation in the lower courts is reminiscent of the classic recurring football drama of Charlie Brown and Lucy in the Peanuts comic strip. Lucy repeatedly assures Charlie Brown that he can kick the football, if only this time he gets it just right. Charlie Brown keeps trying, but Lucy never fails to pull the ball away at the last moment. Here, our court's judgment is that Ohio's legislators, like poor Charlie Brown, have fallen flat on their backs. I doubt that the lawyers and litigants will ever stop this game. Perhaps the Supreme Court will do so.

VI

For the reasons discussed above, I would reverse the district court's order as it applies to the D & X provision, as well as to the medical necessity and medical emergency provisions.

DATE: January 12, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WOMEN'S MEDICAL PROFESSIONAL CORP., et al.,
Plaintiffs-Appellees,

v. : Case No. C-3-95-414

GEORGE VOINOVICH, et al., : JUDGE RICE
Defendants-Appellants

ENTRY CONSOLIDATING HEARING ON PRELIMINARY INJUNCTION WITH TRIAL UPON THE MERITS, PURSUANT TO FED. R. CIV. P. 65(a)(2); PURSUANT TO REASONING, CITATIONS OF AUTHORITY, FINDINGS OF FACT AND CONCLUSIONS OF LAW SET FORTH BY THIS COURT IN ITS ORDER OF DECEMBER 13, 1995, GRANTING THE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (DOC. #31), JUDGMENT IS TO BE ENTERED IN FAVOR OF THE PLAINTIFFS AND AGAINST DEFENDANTS; PERMANENT INJUNCTION GRANTED; LEAVE OF COURT GRANTED DEFENDANTS, NUNC PRO TUNC, TO FILE ANSWER; TERMINATION ENTRY

Pursuant to the agreement of counsel, and pursuant to the authority granted by Fed. R. Civ. P. 65(a)(2), the hearing on the Plaintiffs' Motion for Preliminary Injunction (Doc. #2), is

ordered consolidated with trial upon the merits of the captioned cause.

Based upon the reasoning, citations of authority, Findings of Fact and Conclusions of Law set forth by this Court in its Order of December 13, 1995, granting the Plaintiffs' Motion for Preliminary Injunction (Doc. #31), final judgment is to be entered in favor of the Plaintiffs and against the Defendants herein. Defendants, their employees, agents and servants are permanently enjoined from enforcing any provision of House Bill 135.

Defendants are given leave of Court, nunc pro tunc, January 2, 1996, to file an Answer to the Plaintiffs' Complaint, provided said Answer is filed not later than the close of business on Friday, January 26, 1996.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

January 12, 1996

/s/ WALTER HERBERT RICE
WALTER HERBERT RICE
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

WOMEN'S MEDICAL
PROFESSIONAL CORP.,

JUDGMENT IN A CIVIL CASE

v.

GEORGE VOINOVICH, et al.,

Case Number: C-3-95-414

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the plaintiffs and against the defendants;

that the permanent injunction is granted;

that the above captioned cause is hereby terminated.

1/12/96
Date

Kenneth J. Murphy
Clerk

/s/ Claire Osborn
(By) Deputy Clerk

(3)

Supreme Court, U.S.
FILED

No. 97 934 DEC 5 1997

OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

GEORGE VOINOVICH, et al.,

Petitioners,

v.

WOMEN'S MEDICAL PROFESSIONAL CORP., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
APPENDIX VOLUME II of II

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WOMEN'S MEDICAL PROFESSIONAL CORP., et al., *Plaintiffs-Appellees,*	:
v.	: Case No. C-3-95-414
GEORGE VOINOVICH, et al., *Defendants-Appellants*	: JUDGE RICE

DECISION AND ENTRY GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION (DOC. #2); DEFENDANTS, EMPLOYEES, AGENTS, SERVANTS PRELIMINARILY ENJOINED FROM ENFORCING ANY PROVISION OF HOUSE BILL 135, PENDING A FINAL DECISION ON THE MERITS; CONFERENCE CALL SET TO DETERMINE FURTHER PROCEDURES TO BE FOLLOWED IN THIS LITIGATION

RICE, District Judge.

Never, since the final shot of the Civil War, over a century and a quarter ago, has American society been faced with an issue so polarizing and, at the same time, so totally incapable of either rational discussion or compromise, as is the ongoing controversy, of which this case is but the latest

chapter, over the legality of attempts by the State to regulate abortion--the act of voluntarily terminating a pregnancy, prior to full term.[1]

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[1]According to the Supreme Court's opinion in Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973), until the last half of the nineteenth century, most states used the English common-law approach to abortion, which only criminalized abortion after the fetus "quickened," or moved in utero, which typically occurred during the sixteenth to eighteenth weeks of pregnancy. Id. at 132, 138, 93 S. Ct. at 716, 719. In the latter half of the nineteenth century, a number of states enacted statutes which criminalized abortion, at any stage of pregnancy. Id. at 139. By the end of the 1950s, most states banned all abortions except those necessary to preserve the life or health of the mother. Id.

In Roe, the Supreme Court held that a pregnant woman has a constitutional right to privacy, under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which prevents states from proscribing abortion before viability. 410 U.S. at 147-65, 93 S. Ct. at 724-33. Roe also established a trimester framework: during the first trimester, the State could not interfere with the woman's decision to have an abortion; during the second trimester and until viability, the State could regulate abortion in ways that were reasonably related to the mother's health; after viability, the State could proscribe abortion, except where necessary to preserve the life or health of the mother. Id. at 163-65.

In Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), the Supreme Court reaffirmed Roe 's "central holding" that, prior to viability, the State could not prohibit any woman from obtaining an abortion, because of the woman's liberty interest as protected by the Fourteenth Amendment to the United States Constitution. In contrast to Roe, however, the

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Court placed a greater emphasis on the State's interest in potential life throughout pregnancy. Accordingly, the Court discarded the trimester framework in Roe, and allowed the State to regulate pre-viability abortions as long as the regulation did not impose an "undue burden": that is, as long as the regulation had neither "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Id. at 2820-21.

In the few years since Casey was decided, several states have enacted regulations on pre-viability abortions, and the constitutionality of some of these regulations has been challenged. See, e.g., Planned Parenthood v. Miller, 63 F.3d 1452 (8th Cir.1995) (striking down parental notification provisions, criminal provisions, and civil penalty provisions; upholding mandatory information requirements); Jane L. v. Bangerter, 61 F.3d 1493 (10th Cir.1995) (striking down ban on abortions after 20 weeks, fetal experimentation ban, and choice of method requirement; upholding medical emergency exception); Fargo Women's Health Org. v. Schafer, 18 F.3d 526 (8th Cir.1994) (upholding mandatory information requirement, 24-hour waiting period, and medical emergency definition); Barnes v. Mississippi, 992 F.2d 1335 (5th Cir.) (upholding parental consent requirement and judicial bypass mechanism), cert. denied, 510 U.S. 976, 114 S. Ct. 468, 126 L.Ed.2d 419 (1993); Barnes v. Moore, 970 F.2d 12 (5th Cir.) (upholding informational requirement and 24-hour waiting period), cert. denied, 506 U.S. 1021, 113 S. Ct. 656, 121 L.Ed.2d 582 (1992); Utah Women's Clinic, Inc. v. Leavitt, 844 F. Supp. 1482 (D.Utah 1994) (upholding 24-hour waiting period and medical emergency exception); Planned Parenthood v. Neely, 804 F. Supp. 1210 (D.Ariz.1992) (striking down medical emergency definition, and definition of medical procedures with respect to an abortion).

Over the course of six days of hearings, this Court has heard testimony from a number of medical practitioners, each expert in the field in which he or she testified. This Court believes that, regardless of the personal opinions of these professionals, whether pro-choice or pro-life, each testified, not in accordance with those personal opinions, but rather on the basis of his or her medical opinion. So, too, has this Court endeavored to put aside its personal opinion on the issues herein, in order to render an opinion which it believes is mandated by the present state of the law.

This case presents a challenge to the constitutionality of House Bill 135, which was enacted by the Ohio General Assembly on August 16, 1995, and was to have become effective on November 14, 1995. After hearing two days of testimony, this Court granted a ten-day Temporary Restraining Order on November 13, 1995, which was extended for an additional ten days, and was set to expire today, on December 13, 1995. Following four additional days of testimony, the Court now issues a preliminary injunction which enjoins enforcement of the three major portions of the Act: the ban on the use of the Dilation and Extraction ("D & X") abortion procedure; the ban on the performance of post-viability abortions, and the viability testing requirement. During the effective period of this preliminary injunction, no part of House Bill 135 may be enforced, as there is no part which appears to be either constitutional, or severable, from the remainder of the Act.

This Act creates two separate bans, and a separate requirement with regard to post-viability abortions. First, the

Act bans the use of the Dilation and Extraction ("D & X") procedure[2] in all abortions, including those performed before viability. O.R.C. § 2919.15(B). Physicians who are criminally prosecuted or sued civilly for violating this ban may assert, as an affirmative defense, that all other available abortion procedures would pose a greater risk to the health of the pregnant woman. § 2919.15(C); § 2307.51(C). Second, the Act bans all post-viability abortions, except where necessary to prevent the pregnant woman's death, or to avoid a serious risk of substantial and irreversible impairment to a major bodily function.[3] § 2919.17(A). For purposes of the post-viability ban only, any unborn child of at least 24 weeks is presumed to be viable.[4] § 2919.17(C). Third, the Act also imposes a viability testing requirement before an abortion may be

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[2]The D & X procedure is defined as:

> The termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain. "Dilation and extraction procedure" does not include either the suction curettage procedure of abortion or the suction aspiration procedure of abortion.

O.R.C. § 2919.15(A).

[3]The determination that a post-viability abortion is necessary must be made in good faith, and in the exercise of reasonable medical judgment. O.R.C. § 2919.17(A).

[4]The gestational age is calculated from the first day of the last menstrual period of the pregnant woman. § 2919.16(B).

performed after the 22nd week of pregnancy. § 2919.18. Unless a medical emergency exists, any physician intending to perform a post-viability abortion must meet several requirements.[5] The Act creates civil and criminal liability for violations of the D & X ban or the post-viability ban, and criminal liability for violations of the viability testing requirement.[6]

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[5]The following requirements apply to post-viability abortions: (1) the physician must certify the necessity of the abortion in writing, (2) a second physician must certify the necessity of the abortion in writing, after reviewing the patient's medical records and tests, (3) the abortion must be performed in a health care facility which has access to neonatal services for premature infants, (4) the physician must choose the abortion method which provides the best opportunity for the fetus to survive, unless it would pose a significantly greater risk of death to the pregnant woman, or a serious risk of substantial and irreversible impairment to a major bodily function, and (5) a second physician must be present at the abortion to care for the unborn human. O.R.C. § 2919.17(B)(1). These conditions need not be complied with if the physician determines, in good faith and in the exercise of reasonable medical judgment, that a medical emergency exists and prevents compliance. § 2919.17(B)(2).

[6]Violation of the viability testing requirement is a fourth degree misdemeanor. O.R.C. § 2919.18(B). Violation of either the D & X ban or the post-viability ban is a fourth degree felony. § 2919.15(D), § 2919.17(E). A patient upon whom one of these procedures is performed or attempted to be performed is not criminally liable. § 2919.15(E), § 2919.17(D). She may, however, sue within one year of the procedure or attempted procedure for compensatory punitive, and exemplary damages, as well as for costs and attorneys fees. § 2307.51(B), § 2307.52(B). Derivative claims for relief may also be brought.

Plaintiff Women's Medical Professional Corporation ("WMPC") operates clinics and provides abortion services in Montgomery, Hamilton, and Summit Counties (Doc. # 1, ¶5). Plaintiff Haskell, a doctor affiliated with Plaintiff WMPC, formerly performed abortions after the 24th week, but no longer does so; he uses the D & X procedure for abortions during the 21st to 24th week of gestation (Id., ¶6). On October 27, 1995, Plaintiffs filed this suit for declaratory and injunctive relief from all provisions of the Act, on their own behalf and on behalf of their patients. Plaintiffs allege that this Act imposes an undue burden on the rights of their patients to choose an abortion, and, further, that the Act's provisions are unconstitutionally vague and fail to give physicians fair warning as to what actions will incur criminal and civil liability. Accordingly, they seek to enjoin the Act as a violation of Plaintiffs' rights to privacy, liberty, and due process, as guaranteed by the Fourteenth Amendment to the United States Constitution.

I. Jurisdiction, Ripeness, Standing, Preliminary Injunction Standard

Before addressing the merits of Plaintiffs' request for a preliminary injunction, this Court must address three issues relating to its jurisdiction over this action. First, because this case involves a challenge to the constitutionality of a state statute under the United States Constitution, federal question jurisdiction is proper under 28 U.S.C. § 1331. Second, even though Plaintiff Haskell has not yet been prosecuted for violating the Act, this case is ripe for decision because a doctor facing criminal penalties for performing abortions may sue for pre-enforcement review of the relevant statute. Doe v. Bolton,

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§ 2305.11(D)(3) & (7).

410 U.S. 179, 188, 93 S. Ct. 739, 745-46, 35 L.Ed.2d 201 (1973).

Third, Plaintiff Haskell has the necessary standing to raise both his own rights and the rights of his patients. Because Plaintiff Haskell has asserted that he intends to continue performing the D & X procedure after this law takes effect, he is at direct risk of prosecution, and has standing to seek pre-enforcement review of this statute. Doe, 410 U.S. at 188, 93 S. Ct. at 745-46. Given the close relationship between Plaintiff Haskell and his patients, and given the obstacles which prevent pregnant women from challenging this statute, including a desire for privacy and the imminent mootness of their claims, he may also assert third-party standing and raise the rights of his patients. Singleton v. Wulff, 428 U.S. 106, 96 S. Ct. 2868, 49 L.Ed.2d 826 (1976) (plurality opinion) (allowing two doctors to sue for declaratory and injunctive relief from state statute taking away Medicaid funding for abortions), cited with approval in Planned Parenthood Ass'n v. Cincinnati, 822 F.2d 1390, 1396 (6th Cir.1987). It is also noteworthy that in Planned Parenthood v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992), an action for declaratory and injunctive relief from a state statute restricting the right to abortion was brought by similar plaintiffs: abortion clinics and a doctor. Based on the foregoing authority, Plaintiff Haskell has standing to bring this action, and to assert both his own rights and the rights of his patients. Although Defendants have argued that the Plaintiff must show that a particular woman will be impacted by the Act in order to have standing to raise her rights, this Court agrees with Plaintiff Haskell's argument that such a showing is unnecessary. It is sufficient

that Plaintiff Haskell has alleged that he regularly has patients upon whom he performs the procedure, and that he will have such in the future.[7]

Plaintiff Haskell also has standing to challenge the provisions of the Act which ban post-viability abortions, codified at O.R.C. § 2919.17, and the viability testing requirement in O.R.C. s 2919.18. Defendants have argued that he lacks standing to challenge these provisions, because he only performs the D & X procedure up through the 24th week of pregnancy (Defendant's Memorandum in Opposition, Doc. # 11, p. 27, 34). The ban on post-viability abortions, however, imposes a rebuttable presumption of viability at 24 weeks, O.R.C. § 2919.17(C), which will apply to Plaintiff Haskell. If, in certain cases, he is unable to rebut the presumption of viability, the remaining provisions relating to the ban on post-viability abortions will also apply to him. In addition, Plaintiff Haskell will have to satisfy the viability testing requirement for any patients he treats who are in or beyond their twenty-second week of pregnancy. Therefore, Plaintiff Haskell also has standing to challenge these provisions of House Bill 135.

Plaintiff WMPC sues on behalf of its physicians who are employed at its various affiliated locations, and on behalf of women who receive medical services, including abortions, at these locations. This Court does not now reach the issue of whether Plaintiff WMPC has standing to bring this action, due

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[7]In addition, this Court notes that one such patient, Jane Doe Number 2, testified in this hearing after her abortion was performed by Dr. Haskell on November 30, 1995--two weeks after the Act was to have taken effect.

to an inadequately developed factual record.[8] This issue need not be reached at this time, because Plaintiff's Haskell's standing is sufficient to allow this action to go forward. Accordingly, the remainder of this opinion will use "Plaintiff" in the singular, in reference to Plaintiff Haskell. This Court now turns to the merits of Plaintiff's Motion for a Preliminary Injunction.

When considering whether a preliminary injunction is proper, this Court must consider four factors: (1) the substantial likelihood of the Plaintiff's success on the merits; (2) whether the injunction will save the Plaintiff's patients from irreparable injury; (3) whether the injunction would harm others;[9] and (4) whether the public interest would be served by issuance of the injunction. International Longshoremen's Ass'n v. Norfolk Southern Corp., 927 F.2d 900, 903 (6th Cir.1991), cert. denied, 502 U.S. 813, 112 S. Ct. 63, 116 L.Ed.2d 38 (citing In re DeLorean Motor Co., 755 F.2d 1223, 1228 (6th Cir.1985)). This Court need not conclude that all four factors support its decision. Chrysler Corp. v. Franklin Mint Corp., 1994 U.S.App. LEXIS 18389, at *4 (6th Cir.1994). Rather than being "rigid and unbending requirements" that must be satisfied, these factors are intended to guide this Court's discretion in balancing the equities. In re Eagle-Picher Industries, Inc., 963 F.2d 855, 859 (6th Cir.1992). For

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[8]For example, although Plaintiff WMPC has asserted that it has standing because it will incur civil liability under the Act, this Court does not now have facts sufficient to conclude that Plaintiff WMPC may be civilly liable.

[9]This third prong is also construed as a "balancing of equities"; to wit, whether the harm which would be suffered by the Plaintiff if the injunction were not granted, outweighs the harm which would be suffered by the Defendant if the injunction were to be granted.

example, the degree of likelihood of success which is required to issue a preliminary injunction may vary according to the strength of the other factors. In re DeLorean Motor Co., 755 F.2d at 1229. This Court must make specific findings as to each of these factors, unless fewer are dispositive of the issue. International Longshoremen's Ass'n, 927 F.2d at 903.

II. Plaintiff's Substantial Likelihood of Success on the Merits

Plaintiff has asserted a number of arguments attacking the constitutionality of the D & X ban, the post-viability ban, and the viability testing requirement. Many of these arguments can be divided into two categories: first, those that assert that the Act either imposes an undue burden on a woman's right to an abortion, or jeopardizes the pregnant woman's health, and is thus unconstitutional under Casey; second, those that assert that the Act is unconstitutionally vague. Before addressing these arguments, this Court will briefly set forth the relevant law to be applied to each of these categories. This Court will then consider each of the three challenged statutory provisions in turn.

A. Standards for Challenging Abortion Regulations

1. The Substantive Law

In Planned Parenthood v. Casey, a plurality of the Supreme Court held that viability marks the point at which the State's interest in protecting the potential life of the fetus outweighs the pregnant woman's liberty interest in having an abortion, subject only to a medical determination that her own life or health is at risk. 505 U.S. at 868-70, 874-77, 112 S. Ct. at 2816-17, 2819-2821. Before viability, states may not enact regulations which have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an

abortion...." 112 S. Ct. at 2820. Such regulations constitute an "undue burden" on a pregnant woman's right to have an abortion, and are an unconstitutional violation of her liberty interest, as guaranteed by the Fourteenth Amendment to the United States Constitution. Id. at 2819. After viability, however, the State may regulate and proscribe abortions "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Id. at 2821. Therefore, whereas regulations which affect pre-viability abortions are subject to an undue burden analysis, regulations which apply only to post-viability abortions are presumptively valid, unless they have an adverse impact on the life or health of the pregnant woman.

It has been suggested that "strict scrutiny" should be applied to the medical necessity exception to the ban on post-viability abortions, codified at O.R.C. § 2919.17(A)(1).[10] In the opinion of this Court, a strict scrutiny approach would be improper in this specific situation, because it might allow a state, in some circumstances, to proscribe a post-viability abortion even where such an abortion is necessary to preserve the life or health of the mother. For example, in a situation where the mother is terminally ill, and is only expected to live for a maximum of six months following the post-viability abortion that saves her life, a state might attempt to argue that its interest in the fetus's life was actually more compelling than the mother's compelling interest in her own life, and that this interest should allow it to forbid an abortion in that circumstance.

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[10]Quite obviously, such a level of scrutiny cannot be applied to the ban itself, for Casey instructs us that a state may ban abortions after viability, unless an abortion is necessary, in the appropriate medical judgment, to preserve the life or health of the mother.

This would force courts to decide when, and under what circumstances, an unborn child's life becomes more important, and more worthy of protection, than the life of its mother. In the opinion of this Court, this inquiry is beyond the realm of legal jurisprudence, and must be left to the discretion of the individuals involved. Neither the legislature, nor the courts, has either the legal or the moral authority to balance the interests and the lives involved, and to make this decision.

Therefore, this Court holds that although a state may ban most abortions subsequent to viability, it may not take away a pregnant woman's right, as recognized in Casey, to have a post-viability abortion which is necessary to preserve her life or health. A strict scrutiny analysis could have the effect of narrowing this exception, and should not be applied. Instead, any regulation which impinges upon or narrows this exception, must be declared to be unconstitutional.

2. Standard for Reviewing Facial Challenges to Abortion Regulations

There is some dispute as to the proper showing which Plaintiff must make in order to succeed in bringing this facial challenge.[11] Before the Supreme Court's decision in Casey, a

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[11]The difference between challenging a statute "on its face," as in this case, or in challenging it "as applied," was recently explained by Justice Scalia:

> Statutes are ordinarily challenged ... "as applied"--that is, the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be

plaintiff bringing a facial challenge to a statute imposing restrictions on abortion faced the difficult burden of establishing "that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L.Ed.2d 697 (1987), followed by Rust v. Sullivan, 500 U.S. 173, 183, 111 S. Ct. 1759, 1767, 114 L.Ed.2d 233 (1991) (applying Salerno to facial challenge to regulations prohibiting facilities which receive federal funds from counseling, referring, or advocating abortion as a method of family planning); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 514, 110 S. Ct. 2972, 2980-81, 111 L.Ed.2d 405 (1990) (applying Salerno to facial challenge to judicial bypass procedure for minors seeking abortions); cited in Webster v. Reproductive Health Services, 492 U.S. 490, 524, 109 S. Ct. 3040, 3060, 106 L.Ed.2d 410 (1989) (O'Connor, J., concurring) (applying Salerno to facial challenge to state law prohibiting use of public facilities to perform abortions except where necessary to save the mother's

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> unconstitutional. The practical effect of holding a statute unconstitutional "as applied" is to prevent its future application in a similar context, but not to render it utterly inoperative. To achieve the latter result, the plaintiff must succeed in challenging the statute "on its face."

Ada v. Guam Society of Obstetricians & Gynecologists, 506 U.S. 1011, 113 S. Ct. 633, 121 L.Ed.2d 564 (1992) (Scalia, J., dissenting from denial of cert.). In the instant case, Plaintiff Haskell seeks to have the entirety of House Bill 135 declared unconstitutional, and not only as it applies to this particular situation. Thus, he is bringing a facial challenge to the statute.

life). In Casey, however, the plurality employed a more relaxed standard in striking down the Pennsylvania spousal notification provision: the law was held to be invalid because "in a large fraction of the cases in which [it] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." 505 U.S. at 895, 112 S. Ct. at 2830. Moreover, when examining the informed consent provision, the plurality specifically examined the record, and the facts contained therein, which related to the application of the challenged provision to specific persons and in specific circumstances. Id. at 885-98, 112 S. Ct. at 2825-31. This appeared to signal a new approach to evaluating facial challenges to pre-viability abortion regulations.

Since Casey, a split has developed among the Circuits as to whether the Casey approach has replaced the Salerno standard. The Third and Eighth Circuits, joined by district courts in the Seventh (Indiana) and Tenth Circuits (Utah), have concluded that Casey did replace Salerno. Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1458 (8th Cir.1995) ("we choose to follow what the Supreme Court actually did ... and apply the undue burden test"); Casey v. Planned Parenthood, 14 F.3d 848, 863 n. 21 (3rd Cir.1994) ("the Court has ... set a new standard for facial challenges to pre-viability abortion laws"); A Woman's Choice-East Side Women's Clinic v. Newman, Cause No. IP 95-1148-C H/G, at 19-20 (S.C. Ind. 1995) (memorandum opinion on motion for preliminary injunction) ("this court believes that Casey effectively displaced Salerno's application to abortion laws"); Utah Women's Clinic v. Leavitt, 844 F. Supp. 1482, 1489 (D.Utah 1994) ("to bring a facial challenge in good faith, one must reasonably believe that the statute is incapable of being applied constitutionally in a large fraction of the cases in which it is relevant."). The Fifth Circuit has disagreed, and continues to apply the Salerno standard when evaluating restrictions on abortion. Barnes v. Moore, 970 F.2d 12, 14 n. 2 (5th Cir.1992)

("we do not interpret Casey as having overruled, sub silentio, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes").

The Supreme Court, itself, appears to be split on this issue. Compare Fargo Women' Health Org. v. Schafer, 507 U.S. 1013, 113 S. Ct. 1668, 123 L.Ed.2d 285 (1993) (O'Connor, concurring with denial of application for stay and injunction) (stating that the Casey approach should be followed by lower courts), with Ada v. Guam Society of Obstetricians and Gynecologists, 506 U.S. 1011, 113 S. Ct. 633, 121 L.Ed.2d 564 (1992) (Scalia, dissenting from denial of petition for writ of certiorari) (stating that Court did not change the Salerno standard in Casey).

Not surprisingly, whereas Plaintiff has urged this Court to adopt the Casey approach, Defendants have vigorously argued that the Salerno standard should be employed. Because the Sixth Circuit is silent on the issue of whether Salerno should apply to pre-viability abortion regulations, it is a matter of first impression in this Circuit.

This Court concludes that for purposes of evaluating the ban on the D & X procedure, which is used in the weeks preceding viability, this Court will follow the approach actually undertaken in Casey, and employed by courts in the Third, Seventh, Eighth, and Tenth Circuits, and ask whether, "in a large fraction of the cases in which [the ban] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." This Court makes this decision for two reasons. First, because Casey did not require that every married woman be subject to physical abuse in striking down the spousal notification requirement, the plaintiffs in that case did not have to show that "no set of circumstances exist under which the law would be invalid" in order to successfully challenge it. Second, it seems that it would be impossible, as

a practical matter, to evaluate whether a regulation will create an undue burden on the right to an abortion, without examining specific facts in the record, and evaluating the likely impact that a regulation will have on the specific group of women who are affected by it. For these reasons, this Court declines to apply Salerno to the challenged pre-viability regulations in this case.

Although this Court has concluded that it will not apply Salerno to the pre-viability regulations in House Bill 135, the issue of whether Salerno should apply to the post-viability regulations in House Bill 135 is a separate issue. For purposes of evaluating the ban on post-viability abortions, therefore, this Court must likewise consider whether it is bound to apply the more restrictive Salerno standard.[12]

Whether the Salerno standard for facial challenges should apply to post-viability regulations appears to be an issue of first impression before this, or any, Court. Casey is not dispositive, because the approach in that case is specifically designed to evaluate whether a law restricting access to pre-viability abortions would impose an "undue burden" on a large fraction of the relevant population; it does not evaluate whether a law restricting access to post-viability abortions is invalid simply because it may jeopardize the life or health of a few (or many) pregnant women who need such an abortion.

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[12]Defendants have argued, for example, that the testimony given by Jane Doe Number One and Jane Doe Number Two--both of whom would have been adversely affected by this ban on post-viability abortions--should be disregarded by this Court, because Salerno requires that the law be unconstitutional in all of its applications, rather than in a few or many situations. Because this is a facial challenge, Defendants argue, such testimony as to how the law may affect specific individuals is irrelevant.

Indeed, none of the cases cited above which followed the new Casey approach involved restrictions on post-viability abortions. Thus, this appears to be an issue of first impression in this, or any, Court.

After careful consideration of the interests involved, this Court concludes that the Salerno requirement that the plaintiff must show that "no set of circumstances exists under which the law would be valid," should not apply to facial challenges to post-viability abortion regulations which may unconstitutionally threaten the life or health of even a few pregnant women. The Court so holds for three reasons. First, the cases which have applied Salerno have not involved laws which threaten to inflict, unconstitutionally, such severe and irreparable harm.[13] Second, because the Supreme Court signalled in Casey that an unconstitutional infringement of the liberty interests of some, but not all, pregnant women, is sufficient to justify application of a lesser standard where a pre-viability abortion is concerned, there is no reason why the Court would not similarly apply a lesser standard where a law

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[13]In Rust, the Court applied Salerno to a facial challenge to regulations which restricted the ability of facilities receiving Title X funding to counsel, make referrals, or advocate, abortion. 500 U.S. at 183, 111 S. Ct. at 1767. In Akron Center for Reproductive Health, plaintiffs brought a facial challenge to a parental notification statute; in considering the judicial bypass procedure, the Court applied Salerno, rejecting arguments that the procedure's time requirements might be construed as "business days" instead of "calendar days," and reasoning that the statute should not be invalidated "based on a worst-case analysis that may never occur." 502 U.S. at 514. Finally, in Webster, Justice O'Connor stated that Salerno should apply to a Missouri provision that prohibited the use of public facilities to perform abortions not necessary to save the life of the mother. 490 U.S. at 523.

threatens to deprive some, but not all, pregnant women of their greater constitutional interest in their own life and health. Finally, and most importantly, it would be unconscionable to hold that a pregnant woman--or her estate--may not challenge a post-viability regulation until after she is unconstitutionally deprived of her life or health. Therefore, this Court will allow Plaintiff to facially challenge this post-viability ban, even though he has not shown that "no set of circumstances" exists under which the ban would be valid.

B. Standard for Vagueness Challenges

In addition to arguing that this Act is unconstitutional under Casey, Plaintiff argues that the Act is unconstitutionally vague. When determining whether a statute or regulation is sufficiently vague so as to violate due process, there are several relevant considerations. A statute or regulation may be vague if it fails to give fair warning as to what conduct is prohibited. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972) ("we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"), cited in Fleming v. United States Dept. of Agriculture, 713 F.2d 179, 184 (6th Cir.1983). A statute or regulation may also be vague if it is subject to arbitrary and discriminatory enforcement, due to a failure to provide explicit standards for those who apply the law. Id. Finally, the lack of a mens rea requirement in a statute which imposes criminal liability may indicate that the statute is unconstitutionally vague. Colautti v. Franklin, 439 U.S. 379, 395, 99 S. Ct. 675, 685, 58 L.Ed.2d 596 (1979) ("Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more than 'a trap for those who act in good faith.'").

A vague law is especially problematic in two situations. First, its potential to cause citizens to " 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked," Id. (quoting Baggett v. Bullitt, 377 U.S. 360, 372, 84 S. Ct. 1316, 1322-23, 12 L.Ed.2d 377 (1964)), is of particular concern where the exercise of constitutionally protected rights may be inhibited or "chilled." Colautti v. Franklin, 439 U.S. 379, 391, 99 S. Ct. 675, 683, 58 L.Ed.2d 596 (1979) (applying to the right to an abortion); Baggett, 377 U.S. at 372, 84 S. Ct. at 1322-23 (applying to First Amendment rights). Second, a vague law which provides for criminal penalties is troubling because of the severe consequences which may result from violating the law. Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99, 102 S. Ct. 1186, 1193, 71 L.Ed.2d 362 (1982). When determining whether a law is void for vagueness, this Court must examine the challenged law in light of all of the above considerations.

This Court now turns to Plaintiff's arguments challenging the constitutionality of the D & X ban, the post-viability ban, and the viability testing requirement, for purposes of gauging whether the likelihood of Plaintiff's success on the merits of these arguments is substantial.

C. Ban on Use of the D & X Procedure

1. Vagueness of the Definition of D & X

House Bill 135 bans the performance or attempted performance of any abortion, pre-viability or post-viability, by use of the Dilation and Extraction ("D & X") procedure, which is defined as follows:

> [T]he termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain. 'Dilation and extraction procedure' does not include either the suction curettage procedure of abortion or the suction aspiration procedure of abortion.

O.R.C. § 2919.15(A). Plaintiff argues that this definition is unconstitutionally vague, because it does not adequately distinguish the D & X procedure from a different procedure known as the Dilation and Evacuation ("D & E") procedure. Plaintiff further argues that this vagueness will chill physicians from performing abortions by use of the D & E method, which is the most common method used in the early to mid-second trimester. Defendants dispute this, arguing that the definition does not include or describe the D & E procedure, and so is not vague; further, Defendants argue that the D & E procedure is included in the definition of suction curettage, and so is excepted from the ban.

In order to address this vagueness argument, it is necessary to define and describe the various methods of abortion, based on the testimony in this case. When the procedures are described in detail, it becomes apparent that the statutory definition of the Dilation and Extraction procedure could be construed to include the more widespread Dilation and

Evacuation ("D & E") procedure. It also becomes apparent that the D & E method is not included in any definition of suction curettage: although a D & E procedure does include suction curettage, it also includes additional steps, such as dismemberment, and additional instruments, such as forceps. Furthermore, suction curettage is a first-trimester procedure, whereas D & E is a second-trimester procedure. Accordingly, Plaintiff has demonstrated a substantial likelihood of success of showing that the definition of a D & X procedure is unconstitutionally vague.

a. suction curettage/aspiration

Suction curettage and suction aspiration (also known as vacuum aspiration) are common methods of first-trimester abortions, and the terms are used interchangeably (Tr., 12/6, at 13, 115).[14] In a suction curettage procedure, the doctor mechanically dilates the opening to the uterus by the use of metal rods, inserts a vacuum apparatus into the uterus, and removes the products of conception by the use of negative suction (Tr., 12/5, at 33). There is no need to dilate the patient's cervix in the days before the procedure is performed (Id.). Suction curettage/aspiration can sometimes be performed up to the 15th week of pregnancy, but is typically a first-trimester procedure (Id.). Approximately ninety-five

[14]The transcripts of the hearing testimony are, for the most part, paginated separately for each day of testimony. Therefore, when referring to transcript testimony throughout this opinion, this Court will indicate the date of the transcript, as well as the page on which the specific reference may be found.

percent of the abortions which are performed in this country are performed during the first fifteen weeks of pregnancy [15] (Tr., 12/6, at 13).

b Dilation & Evacuation (D & E)

In the second trimester, the fetus becomes too large to remove by use of suction curettage (Tr., 12/5, at 33-34). At that point, the most common abortion method is a Dilation and Evacuation (D & E) procedure; indeed, it is the only procedure which can be used from the thirteenth to sixteenth weeks of pregnancy (Tr., 11/8, at 51). Instead of using metal rods to dilate the cervix over a short period of time, the doctor inserts laminaria into the cervix during the one-to-two day period prior to the procedure, in order to slowly dilate the cervix. Then, a suction curette with a larger diameter is placed through the cervix, and the doctor removes some, or all, of the fetal tissue.

Frequently, however, the torso and the head cannot be removed in this manner (Tr., 12/5, at 35). The procedure typically results, therefore, in a dismemberment of the fetus, beginning with the extremities. This dismemberment is accomplished both by use of the suction curettage, and by the use of forceps (Id.).

[15]The testimony indicates that some women who seek abortions in their second trimester are victims of rape or incest, and may have been psychologically unable to face their pregnancies at an earlier time (Tr., 11/8, at 27). Other women who seek abortions in the second trimester do so because it is only then that they discover that their fetus has developed severe anomalies, i.e., physical defects that call into question the ability of the fetus, once carried to term, to survive (Tr., 12/5, at 103-08).

Removing the head of the fetus from the uterus is typically the most difficult part of the D & E procedure, in part because the head is often too large to fit through the partially dilated cervix. It is important to remove the head as quickly as possible, because fetal neurologic tissue can negatively affect the mother's ability to clot, and lead to greater bleeding (Tr., 12/6, at 32). Physicians have developed different methods of decompressing the head, in order to remove it.

Dr. Anthony Levatino testified that when he performed D & E abortions, he preferred to grasp the fetal head with a clamp, crush it, and remove it in pieces along with the skull contents (Tr., 12/7, at 190). Because he decompressed the skull by crushing it, he found it unnecessary to decompress the skull by purposely inserting a suction device into the skull and removing some of its contents (Id. at 192).

Dr. Paula Hillard testified that when the skull is too large to remove intact, she grasps the skull and suctions out its contents with a cannula--which may enter the skull--in order to decompress it and facilitate its removal (Tr., 11/8, at 77). She has never performed the procedure utilized by Dr. Haskell (Id. at 49).

Dr. Doe Number One testified that because the use of forceps can cause trauma to the mother's uterus, his preference is to collapse the head by the use of suction, prior to its removal. By making a small incision at the base of the skull and inserting a suction device into the brain--while the head is still within the uterus, and no longer attached to the body--he can collapse the head and easily remove it, without the use of forceps (Tr., 12/5, at 43). This method decreases injury to the cervix and uterus, and reduces operating room time, blood loss, and anesthesia time (Id. at 44). Dr. Doe describes his procedure as a D & E, and collapses the head by the use of suction even in procedures performed from 15 to 18 weeks.

Although he does not always collapse the head in this fashion, Dr. Doe Number One testified that the two procedures--D & E with collapse, and D & E without collapse--are on a continuum (Id. at 72). He has never performed the procedure utilized by Dr. Haskell (Id. at 84).

Dr. Mary Campbell has not performed second-trimester abortions, but has read about and observed various second-trimester methods, in preparation for setting up a second-trimester practice at her clinic. In describing the D & E procedure, she testified that the fetal skull is generally not intact following dismemberment of the body--the jaw is often removed with the neck--and "the edges of the fetal skull are sharp enough to lacerate the maternal uterine [blood] vessels ..." (Tr., 12/6, at 35). The goal is therefore to place the suction cannula into the skull in order to remove its contents and make it smaller, thereby allowing it to be removed intact, in order to minimize lacerations (Id. at 33). In addition, removing the head intact is advantageous because it ensures that no parts of the skull are left behind in the woman's uterus (Id. at 35).

Dr. Harlan Giles, who performs D & E abortions up to the twentieth week of pregnancy, testified that he had never seen an instance in which the fetal head was too large to be removed without being crushed or somehow decompressed, but he admitted that such an occurrence was possible (Tr., 11/13, at 269-70; Tr., 12/8, at 41).

The D & E procedure appears to be preferable to other available procedures before the twentieth week; at thirteen to sixteen weeks, it is the only available procedure. The main alternative to a D & E procedure after sixteen weeks is an induction or instillation method, which involves either the injection of saline, urea, or prostaglandins into the amniotic cavity, or, the insertion of vaginal prostaglandin suppositories. These procedures result in labor, and are further described

below. The D & E procedure appears to be less painful for the mother than induction procedures, because it does not require labor, and because the cervix is dilated slowly with laminaria rather than being dilated more forcefully by uterine contractions. In addition, the D & E procedure takes less time, generally between ten and twenty minutes, as opposed to twelve to thirty-six hours. Because the uterus is not under pressure over a long period of time, there is less of a risk of forcing fluids or fetal proteins into the maternal circulation (Tr., 12/6, at 31). Finally, there is a reduced risk of retained products of conception, infection, hemorrhage, and cervical injury (Id. at 39).

Although the D & E procedure appears to have a lower rate of complications than other methods of abortion in the early to mid-second trimester, it can be equally risky at later periods, when the fetus is larger. One serious complication of later D & Es is caused by the use of forceps, which results in uterine and cervical injuries, and increased blood loss (Tr., 12/5, at 41).

c. Dilation and Extraction (D & X)

In this section, the Court will describe Dr. Haskell's specific method of abortion, which has been described by various parties as either an "intact D & E," a "brain suction procedure," or a "Dilation and Extraction" procedure. It is typically used late in the second trimester, from twenty to twenty-four weeks.

Plaintiff Haskell described his procedure in a paper presented at the National Abortion Federation Conference in 1992 (Defendant's Exhibit A). The following description is taken from that paper.

On the first and second days of the procedure, Dr. Haskell inserts dilators into the patient's cervix. On the third day, the dilators are removed and the patient's membranes are ruptured.[16] Then, with the guidance of ultrasound, Haskell inserts forceps into the uterus, grasps a lower extremity, and pulls it into the vagina. With his fingers, Haskell then delivers the other lower extremity, the torso, shoulders, and the upper extremities. The skull, which is too big to be delivered, lodges in the internal cervical os.[17] Haskell uses his fingers to push the anterior cervical lip out of the way, then presses a pair of scissors against the base of the fetal skull. He then forces the scissors into the base of the skull, spreads them to enlarge the opening, removes the scissors, inserts a suction catheter, and evacuates the skull contents. With the head decompressed, he then removes the fetus completely from the patient.

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[16]Defendants pointed out that, in the videotape in which Dr. Haskell demonstrates the procedure (Defendant's Exhibit R), the patient's membranes had ruptured (her "water had broken") prior to the procedure, on the very first day. Although this fact might be relevant if this were a medical malpractice action brought by that particular patient, it is not relevant to the issue of whether the D & X procedure is generally safe for the mother's health.

[17]Although Dr. Haskell does not state in his paper that he cuts the umbilical cord prior to penetrating the base of the skull with scissors, he testified that he routinely cuts the cord, and he did so on the videotape which demonstrates this procedure (Defendant's Exhibit R). Further, although the Court notes that it generally takes eight to ten minutes for the fetus to die, following the cutting of the umbilical cord, and that, on the videotape, Haskell waited only thirty seconds from the time he cut the cord to the time he inserted the scissors, this Court also notes that the fetus in the videotape appeared to be dead at the beginning of the procedure.

The primary distinction between this D & X procedure and the D & E procedure previously described appears to be that, whereas the D & E procedure results in dismemberment and piece-by-piece removal of the fetus from the uterus--and, possibly, in removal of portions of the skull contents by the use of suction after the skull is crushed with forceps or otherwise invaded, and before the head is placed next to the opening to the uterus--the D & X procedure results in a fetus which is removed basically intact except for portions of the skull contents, which are suctioned out after the head is placed next to the opening to the uterus (and after the rest of the fetus is removed from the uterus), and before the fetus is fully removed from the mother's body.[18] The hallmark of the D & X procedure, therefore, is that the fetus is removed intact, rather than being dismembered prior to removal, as is done in a D & E procedure. In both procedures, the head usually must be decompressed, either by crushing the skull, or by invading the skull and suctioning out its contents. In the D & X procedure, the suctioning is purposeful; in a D & E procedure, the suction may either be purposeful, or, given the inability to clearly see the fetus, even with ultrasound, and the consequent difficulty of knowing whether the surgical instrument is in, or simply near, the skull, it may be accidental.

The testimony indicates that the D & X procedure may be considered to be a variant of the D & E technique.[19] Indeed,

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[18]If the skull could not be decompressed by suctioning out part of the contents, and yet was too big to pass through the cervix, it apparently would have to be crushed in order to remove it.

[19]The testimony indicates that each physician's surgical procedures may differ from similar procedures used by other physicians (Tr., 12/6, at 103). Indeed, physicians experiment with and develop their own variants of surgical techniques, and

doctors who use the procedure may not know which procedure they will perform until they encounter particular surgical variables and circumstances after they begin the procedure to terminate the pregnancy.[20] The doctor may intend to do a D & X in cases where the patient has requested an intact fetus for

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then use them, even if those variants are not specifically approved in a peer review journal (Id. at 104).

In this case, Dr. John Doe Number One testified that he developed a procedure which is similar to Haskell's D & X procedure for use in his D & E procedures at fifteen to eighteen weeks: after the extremities of the fetus are dismembered and removed, he collapses the head by making an incision and then using suction to decompress the skull, instead of crushing it with forceps, so that he can remove the skull intact (Tr., 12/5, at 42-44). Dr. John Doe Number Two, who uses Haskell's D & X procedure in situations where an intact fetus is requested, or if the fetus is breech (feet first), testified that he considers the D&X procedure to be a modification of the D&E procedure (Tr., 12/6 at 47-48).

[20]Dr. Doe Number Two testified, for example, that he uses the D & X procedure in the specific circumstances when the fetus is "double footling breech" and comes out feet first, resulting in a trapped head. At that point, he has "no room to work" because the head is trapped in the lower uterine segment, and must try to finish the procedure as quickly as possible to lower the risks to the mother. In that circumstance, the D & X procedure is the safest and fastest method. If he were prohibited from suctioning out the skull contents to decompress the head, he would have to dismember the head from the body, push the detached head back up into the uterus, crush the skull with the appropriate instruments, and then remove it in pieces (Tr., 12/7, at 76).

purposes of genetic testing, or, perhaps, where a patient has a history of Cesarean sections and a uterine scar, and thus is more vulnerable to uterine injury (Tr., 12/7, at 89).

Based on the testimony of various physicians, this Court further finds that in both the D & E and the D & X procedures, a suction device may be purposely inserted into the skull in order to remove the skull contents, to accomplish the goal of decompressing the fetal head, thereby facilitating its removal from the woman's body. Because the statutory definition of the prohibited "Dilation and Extraction Procedure" thereby appears to encompass the purportedly allowable D & E procedure as well, Plaintiff has demonstrated a substantial likelihood of success of showing that this definition is unconstitutionally vague, as it does not provide physicians with fair warning as to what conduct is permitted, and as to what conduct will expose them to criminal and civil liability.[21]

2. Constitutionality of Banning the Specific Abortion Procedure at Issue

As far as this Court is aware, only one case has considered the propriety of a ban on a specific abortion procedure. In Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L.Ed.2d 788 (1976), the Supreme Court struck down a ban on the second-trimester abortion method of saline amniocentisis. The Court reasoned that, because the method was commonly used and was safer than

[21]In addition, this Court notes that House Bill 135 bans not only the performance of D & X abortions, but also the attempted performance of D & X abortions. Given this Court's finding that the D & X procedure is on a continuum with the D & E procedure, this phrase adds confusion as to when a doctor, who is performing a D & E abortion, attempts to perform a D & X, and thus incurs criminal and civil liability.

other available methods, it failed to serve the stated purpose of protecting maternal health. The Court concluded that, given that there were no safe, available alternatives to the banned method, the ban was "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority" of second trimester abortions. Accordingly the ban was held to be unconstitutional. Id. at 75-79.

The reasoning in Danforth suggests that a state may act to prohibit a method of abortion, if there are safe and available alternatives. This reading comports with Casey, which dictates that if a ban on a specific method were to place a substantial obstacle in the path of a woman seeking a pre-viability abortion--for example, if there were no safe and available alternative method of abortion--the ban would be an undue burden and therefore unconstitutional. The issue before this Court, therefore, is whether, in Ohio, there are safe and available alternatives to the D & X procedure, which is typically performed during the twentieth to twenty-fourth weeks of pregnancy, such that there would be no undue burden if the procedure were banned.

a. D & E Procedure

Due to the larger size of the fetus in the mid to late-second trimester, when the fetus is not necessarily viable, the D & E is no longer the procedure of choice to perform an abortion.[22] Therefore, in considering the safest method of

[22]Additional obstacles to performing a D & E after the twenty-second week of pregnancy include: the presentation of the fetus, in which the spine is oriented toward the cervix, and the toughness of the fetal tissues; both of these factors make it more difficult to dismember the fetus (Tr., 11/8, at 177). Because the operating time is thereby increased, this can cause heavy blood loss (Id. at 178).

abortion at this stage of pregnancy, this Court will compare the D & X procedure--which is typically performed from the twentieth to the twenty-fourth weeks of pregnancy--to other available procedures.

b. Instillation/Induction Procedures

The main alternative to the D & X procedure, in the late second trimester, is the use of an induction method of abortion. Induction methods are also known as "instillation" methods. In one type of induction method, the physician injects some substance--typically saline, or a combination of a prostaglandin and urea--into the amniotic cavity of the woman. In another type, the physician places prostaglandin suppositories into the patient's vagina. In both cases, the end result is labor: the substances cause the uterus to contract, resulting in the eventual expulsion of the fetus. This labor typically lasts between twelve and twenty-four hours (Tr., 12/6, at 25), but may last as long as thirty-six hours (Id. at 118).

The evidence suggests that induction methods were more frequently used in the 1970s, when the D & E procedure was just being developed. Also, induction procedures are more often used by less skilled physicians (Id. at 22). Finally, they must be performed in a hospital environment, and so cannot be done on an outpatient basis.

There appear to be two advantages which induction methods have over the D & E procedure: they require less skill to perform, and they do not involve the placement of any sharp instruments into the uterus (Id. at 29).

One obvious disadvantage of the induction method is that it results in labor, with all of its potential complications. These may include: fear, lack of control, mild to severe abdominal pain, nausea, and diarrhea, and extreme discomfort,

over a lengthy period of time. The substances used, especially saline, may result in mild side effects--vomiting, diarrhea, and high fever--or in severe maternal complications. The fluids which are introduced may be forced into the maternal circulation, leading either to amniotic fluid embolus, which is generally fatal, or to disseminated intravascular coagulation (DIC), in which the clotting factors in the blood are used up, and bleeding cannot be stopped. Induction methods can also thin out the lower uterus to the point that the fetus comes through the uterine wall instead of through the vagina (Tr., 12/6, at 25-26). In addition, induction methods cannot be performed on women who have an active pelvic infection, or who are carrying dead fetuses (Id. at 26), and probably should not be performed on women who had previously had Cesarean sections, given the possibility of rupturing the uterine scar (Id. at 28). Finally, induction methods may be ineffective in cases where the fetus is lying with its head on one side and its feet on the other, because there is no pressure against the cervix (Id. at 27), and the fetus will not be expelled from the uterus.

c. Hysterectomy/Hysterotomy

Another alternative to the D & X is a hysterotomy, which is essentially a Cesarean section performed before term, although it is potentially more dangerous because the uterus is thicker than it is at the end of term, and the incision causes more bleeding and may make future pregnancies more difficult. A more extreme alternative is a hysterectomy, which removes the uterus completely. Both of these methods entail the risks associated with major surgical procedures, and are rarely used today.

d. D & X Procedure

Before discussing the apparent benefits and risks of the D & X procedure, it is necessary to address Defendant's

arguments that the procedure has no measurable benefits, for the reason that no peer review journal has published any studies measuring these benefits. The Court acknowledges that if there were a statistical study, published in a peer review journal, which demonstrated the benefits of the D & X procedure, this would make the asserted benefits more credible. Nevertheless, the lack of a study in a peer review journal does not, ipso facto, mean that there are no benefits, or no risks. Indeed, in this situation, there are a number of factors which help to explain the lack of such a statistical study.

First, the D & X procedure is relatively new--it apparently was first described in 1992--and it will take time for other practitioners to begin using and evaluating the procedure. Second, given the security concerns which must be considered by doctors who perform abortions, physicians who use the D & X procedure may be understandably reluctant to publicly acknowledge that they use this procedure, and may be even more reluctant to participate in a study and publish the results. Finally, as was testified to by Dr. Mary Campbell, funding for studies of abortion methods was cut drastically in the early 1980s, and there have been no large-scale abortion studies since that time (Tr., 12/6, at 74, 76). Given these obstacles to performing and publishing statistically valid studies on new

abortion methods, this Court is not persuaded that the absence of a study on D & X abortions in the medical literature means that the procedure has no benefits.[23]

Dr. George Goler, the Ohio Section Chief of the American College of Obstetricians and Gynecologists, testified that he views Dr. Haskell's procedure as an improvement over the traditional D & E procedure, because it causes less trauma to the maternal tissues (by avoiding the break up of bones, and the possible laceration caused by their raw edges), less blood loss, and results in an intact fetus that can be studied for genetic reasons (Tr., 12/6, at 126). Dr. Haynes Robinson, a pathologist and geneticist, testified that it is sometimes desirable to obtain an intact fetus in order to confirm the presence of fetal anomalies, and to predict their likely recurrence in future pregnancies (Tr., 12/5, at 118). Although an intact fetus can be obtained following an induction or instillation procedure--and such a method might be preferable where the brain needs to be studied intact--the use of various substances to induce labor can cause autolysis, or the breaking down of tissue, which may make the fetal tissue less useful for such studies (Tr., 12/6, at 34). A further advantage over induction or instillation procedures is that the D & X procedure takes far less time--ten to twenty minutes--than the twelve to thirty-six hours in which

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[23]In addition, and for similar reasoning, this Court is unpersuaded by the Defendant's argument that the D & X procedure is not within the accepted medical standards. This is a new, controversial procedure. As Dr. Goler testified: "I don't think enough people know about it to really say its within the accepted standards of practice. I think, as it gets to be better known and the results [are] published, it will be." (Tr., 12/6, at 133-34). Given the recent development of the D & X procedure, the fact that no publication has concluded, to date, that it is within acceptable medical standards, is not dispositive.

a woman must be in labor following an induction or instillation procedure.[24]

Plaintiff Haskell testified that, in approximately 1,000 D & E procedures performed after the twentieth week of pregnancy, two patients had serious complications (Tr., 11/8, at 149). In approximately 1,000 D & X procedures performed after the twentieth week of pregnancy, there were no serious complications (Id. at 150-51). Although this is anecdotal, not statistical, evidence, this Court finds that it is both uncontradicted and plausible.

Dr. Levatino, who has performed D & E but not D & X abortions, predicted that the D & X procedure would have greater complications than the induction methods, because there is an increased possibility of perforating the patient's uterus when the abortion is performed in the late second trimester (Tr., 12/7, at 198, 205). This testimony appears, however, to have been based less on his analysis of the specific procedure than on his estimate of the risks of performing late-term D & E abortions, generally. As noted earlier, the D & E procedure can be risky in the late-second trimester, because the fetus is larger and more difficult to dismember, and the use of forceps in the uterus becomes more dangerous. The D & X procedure mitigates this risk by delivering the fetus intact--except for a decompression of the head after it has been placed next to the opening to the uterus--and thus would not

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[24]This Court rejects Defendant's claim that the D & X procedure takes longer, because it requires the insertion of laminaria one or two days before the procedure. Dr. Doe Number Two testified that the insertion of laminaria does not impair the woman's ability to function in any way, nor does it cause major discomfort, although it may cause some cramping. This does not compare to the more traumatic experience of going through labor.

appear to bear an increased risk of uterine perforation. Although forceps are still used, their use appears to be minimized.

Dr. Giles testified that the procedure is not new, but is rather a resurrection of an obstetric method discarded in the 1960s, which was used to deliver dead fetuses, and known as craniotomy (Tr., 12/8, at 18-23). His criticisms of the D & X procedure on this ground are not persuasive. First, the reason for the abandonment of the craniotomy procedure--which required the use of sharp instruments, and caused uterine lacerations and perforations--does not appear to be relevant to the D & X procedure, which reduces the risk of uterine lacerations (in comparison to the D & E procedure) by delivering all but the head of the fetus intact, which is then decompressed by the use of scissors and suction. Second, unlike the situation in the 1960s, ultrasound can now be utilized to help to avoid injury when sharp instruments are introduced into the uterus.

Finally, in regard to the availability of the D & X procedure, it can be performed on an outpatient basis, and does not require hospitalization. Although the procedure requires three separate visits to the clinic, the insertion of laminaria on days one and two takes less than an hour (Tr., 12/5, at 22), and the D & X procedure itself, which is performed on the third day, requires a total time of less than two hours (Id.). At least three doctors in Ohio perform some variation of the D & X procedure: Plaintiff Haskell (Tr., 11/8, at 109-10); Dr. John Doe Number One (Tr., 12/5, at 43); and Dr. John Doe Number Two (Tr., 12/7, at 47-48).

e. Conclusion

After viewing all of the evidence, and hearing all of the testimony, this Court finds that use of the D & X procedure in the late second trimester appears to pose less of a risk to maternal health than does the D & E procedure, because it is less invasive--that is, it does not require sharp instruments to be inserted into the uterus with the same frequency or extent--and does not pose the same degree of risk of uterine and cervical lacerations, due to the reduced use of forceps in the uterus, and due to the removal of any need to crush the skull and remove it in pieces, which can injure maternal tissue.

This Court also finds that the D & X procedure appears to pose less of a risk to maternal health than the use of induction procedures, which require the woman to go through labor, pose additional risks resulting from the injection of fluids into the mother, and cannot be used for every woman needing an abortion.

Finally, the Court finds that the D & X procedure appears to pose less of a risk to maternal health than either a hysterotomy or a hysterectomy, both of which are major, traumatic surgeries.

Because the D & X procedure appears to have the potential of being a safer procedure than all other available abortion procedures, this Court holds that the Plaintiff has demonstrated a substantial likelihood of success of showing that the state is not constitutionally permitted to ban the procedure. If this abortion procedure, which appears to pose less of a risk to maternal health than any other alternative, were banned, and women were forced to use riskier and more deleterious abortion procedures, the ban could have the effect of placing a substantial obstacle in the path of women seeking

pre-viability abortions, which would be an undue burden and thus unconstitutional under Casey.

Even if induction procedures were as safe as the D & X procedure--and this Court does not find, on the evidence, that they are as safe--the requirement that a pregnant woman be hospitalized in order to undergo an induction procedure may also have a negative impact on the practical availability of abortions for women seeking pre-viability abortions. First, hospitals may refuse to allow induction procedures on an elective basis,[25] including those situations in which a woman wishes to abort a fetus with severe anomalies. Second, it may be psychologically daunting to undergo the induction procedure in the hospital environment.[26] These practical problems may

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[25]For example, Miami Valley Hospital, in Dayton, Ohio, only permits therapeutic abortions, and does not allow their performance on an elective basis (Defendant's Exhibit F). Dr. George Goler, the Ohio Section Chief of the American College of Obstetricians and Gynecologists, also testified that "it's gotten to the point now where many of the hospitals do not have facilities" to perform abortions by use of induction methods (Tr., 12/6 at 118). Although Dr. Harlan Giles, a Pennsylvania physician, testified that it was his opinion that several Ohio facilities allowed the performance of elective abortions (Tr., 11/13, at 237), this Court is more inclined to rely on the testimony of Dr. Goler, who practices in Ohio, and whose testimony was specifically directed toward second-trimester abortions. This Court concludes that the preponderance of the evidence is that few Ohio hospitals allow non-therapeutic, second-trimester abortions.

[26]Dr. Doe Number One, who used to perform induction procedures but now performs a version of the D & X procedure,

discourage women in their second trimester from exercising their right of seeking elective, pre-viability abortions, or make it practically impossible to do so, thereby amounting to an undue burden on the right to seek a pre-viability abortion. In contrast, the D & X procedure can be performed on an outpatient basis within a much shorter period of time, and is not limited by either of these practical problems.

For both of these reasons--because the D & X procedure appears to be the safest method of terminating a pregnancy in the late second trimester, and because the D & X procedure is more available than induction methods, which require the woman to be hospitalized--this Court holds that Plaintiff has

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testified that hospitals and hospital personnel view induction procedures as a "second-class procedure" performed on "second-class patients," and that the problem is exacerbated by the practice of locating the woman obtaining the abortion in close proximity to women giving birth (Tr., 12/5, at 37-38). Dr. Mary Campbell also testified that it's depressing for the patient to undergo an abortion procedure in the labor and delivery area of a hospital: "These are families often with wanted pregnancies gone awry who in the course of their time in the hospital ... get to hear several other families through closed doors ... shouting rather happily ... it's a boy or it's a girl." (Tr., 12/6, at 28-29).

demonstrated a substantial likelihood of success of showing that the ban on the D & X procedure is unconstitutional under Danforth and Casey.[27]

3. Legitimacy of the State's Asserted Interest in Banning the D & X Procedure

Next, this Court turns to the state's asserted interest in enacting the ban on the D & X procedure, and to the constitutional legitimacy of that interest. The Ohio General Assembly declared that its intent in banning the D & X procedure was: "to prevent the unnecessary use of a specific procedure used in performing an abortion. This intent is based on a state interest in preventing unnecessary cruelty to the human fetus." House Bill 135, Sec. 3 (emphasis added).

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[27]Defendants have argued that the affirmative defense, codified at O.R.C. § 2919.15(C), saves the ban from being an undue burden. Under the affirmative defense, if a physician who is prosecuted for performing a D & X procedure can present prima facie evidence that all other procedures would have posed a greater risk to the mother's health, then the prosecutor has the burden of proving, beyond a reasonable doubt, that at least one other abortion method would not have posed a greater risk to the mother's health.

Defendants' argument is unpersuasive, for two reasons. First, the certainty of arrest and prosecution is certain to chill physicians from performing the D & X procedure, even where it is the least risky method of abortion. Second, even if there were no chilling effect, the challenged law restricts the availability of D & X procedures to situations where it is obviously and irrefutably the safest method. Given this Court's findings that the D & X procedure may be safer and more available than other methods of abortion, this would still amount to an undue burden.

In Casey, the Supreme Court recognized two specific interests which the state has in regulating abortions prior to viability. First, "to promote the State's profound interest in potential life throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and [these] will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion." 505 U.S. at 878, 112 S. Ct. at 2821. Second, "the State may enact regulations to further the health or safety of a woman seeking an abortion." Id. Neither of these interests, however, justify regulations which impose an undue burden on the right to seek a pre-viability abortion.

Because Casey only specifically mentioned these two interests, Plaintiff argues that any other interest--such as that of preventing unnecessary cruelty to the fetus during the abortion--is neither proper nor legitimate. Defendants argue that the interest is justified by the "State's profound interest in potential life throughout pregnancy," and that it would be contrary to logic and common sense to hold that this interest is not legitimate. The State further argues that if it is permitted to impose regulations which prevent cruelty to animals, then surely, it should be permitted to impose regulations which prevent cruelty to fetuses.

Again, this appears to be an issue of first impression before this, or any, Court. To this Court's knowledge, no abortion regulation has heretofore been justified by an interest in preventing unnecessary cruelty to the fetus. Moreover, this Court has no precedent to directly guide and inform its decision. There are, however, a few observations which help its analysis.

First, and foremost, this Court is mindful of Casey 's strong recognition of the State's interest in potential life throughout the pregnancy. Second, although Casey only

specifically delineated a few interests which the state has which justify regulation, nowhere in the opinion did the Court hold that no other state interest could justify regulations on pre-viability abortions. These observations, taken together, suggest that the state may impose regulations which vindicate its interest in the potential life of the fetus, based on interests other than those of persuading the woman to choose childbirth over abortion, or of protecting her health and safety. Finally, the Court agrees with Defendants that it would be contrary to all logic and common sense, to hold that a state has no interest in preventing unnecessary cruelty to fetuses.

Assuming arguendo that the interest is legitimate, however, Casey is clear in holding that regulations enacted to further legitimate interests may not impose an undue burden on the right to seek a pre-viability abortion. Because Plaintiff has demonstrated a substantial likelihood of success of showing that the ban on D & X abortions would impose an undue burden on the right, the legitimacy of the state's interest, no matter how legitimate or compelling, will, in all likelihood, once the merits of this litigation are determined, not save the ban from being unconstitutional.

Although the Court need not, at this point, address the testimony concerning the cruelty of the D & X procedure--given that Plaintiff has demonstrated a substantial likelihood of success of showing that the ban on the procedure is an undue burden and therefore is unconstitutional--it is in the public interest to discuss the issue of cruelty. Therefore, this Court now turns to the relevant testimony.

Defendants called two experts to testify to the pain felt by the fetus during the D & X procedure.[28]

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[28]Plaintiff Haskell testified that he didn't believe that fetal neurological development at twenty-four weeks would

Dr. Joseph Conomy is a professor of clinical neurology at Case Western Reserve University, and is involved in the issue of medical ethics. He has studied the formation of the nervous system, and has worked on problems of the nervous system in fetuses and newborn infants.

In regard to fetal neurology, Dr. Conomy testified that, at the age of twenty to twenty-four weeks, many of the neural pathways which transmit pain to the brain are established, although the cortical projections from the lower level of the brain, the thalamus, are not yet established (Tr., 11/13, at 301). It is his opinion, therefore, that pain can be transmitted to at least the lower levels of the brain at that age (Id. at 302).

Dr. Conomy further testified that fetuses at the age of twenty to twenty-four weeks respond to nurturing stimuli, such as stroking the face, and noxious stimuli, such as pricking the skin, in different ways. Nurturing stimuli may cause a turning of the head, or pursing of the lips. Noxious stimuli will cause flexion and withdrawal (Id. at 300-302).

In reference to the D & X procedure, Dr. Conomy testified that it is his opinion that the procedure would prompt an unpleasurable stimulus to the fetus (Id. at 303). He also testified, however, that it would be "speculative" to try to "get inside the mind of a fetus, if there is one." (Id. at 301). Indeed, Dr. Conomy specifically refused to testify that a fetus can feel pain: although the fetus does "exhibit a class of responses that are characteristic of reflex response to obnoxious stimulation.... feeling is very much beyond that because it involves

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allow pain impulses to be transmitted to the brain (Tr., 11/8, at 179), and that a fetus of the same age lacked the cognitive ability to perceive pain (Id. at 180). Because Dr. Haskell was not qualified as an expert in the area of fetal neurology, this Court will not consider this testimony.

perception, designation, locality, and things that are far too speculative for me to assure you that a fetus feels." (Id. at 305). Thus, although Dr. Conomy testified that a fetus at the age of twenty to twenty-four weeks may physically respond to noxious stimuli, he did not testify that the fetus has a conscious, mindful awareness of the pain it is experiencing.

Finally, Dr. Conomy testified that a fetus who is aborted by the D & E procedure, which involves dismemberment, might experience as much discomfort as a fetus who is aborted by the D & X procedure (Id. at 307).

Defendants' second expert was Dr. Robert White, who is a professor of neurosurgery at Case Western Reserve University. He has been the director of a brain research laboratory for thirty years, but has not specifically studied pain or its mechanisms.

In his testimony, Dr. White defined "pain" as a physiological, or perhaps behavioral, expression resulting from the appreciation of a noxious stimulus (Tr., 12/7, at 119-120).

In particular reference to the mechanics of the D & X procedure, Dr. White testified that two maneuvers would cause pain to the fetus. First, the act of compressing, rotating, and pulling the fetus down into the birth canal--which also occurs during childbirth, at a more advanced age--must cause pain to the fetus (Id. at 131). Second, it was his opinion that the act of making an incision in the back of the neck and enlarging it--without, apparently, cutting any part of the nervous system--and then inserting a suction tube and evacuating the skull contents, must be painful (Id.).

Initially, Dr. White testified that it was his opinion that the fetus may feel pain during the D & X procedure; this answer was stricken from the record because it did not indicate

an opinion within reasonable medical probability (Id. at 110-11). Later in his testimony, and after viewing a videotape of the procedure being performed on a dead fetus, Dr. White amended his opinion to state that the fetus can feel pain (Id. at 124). He based this opinion partly on the small size of the infant, which means that pain travels a much shorter distance than in adults, and partly on his opinion that chemicals in the brain which suppress pain are not established in fetuses, whereas, chemicals which reinforce pain are so established (Id. at 126-27). He also disputed Dr. Conomy's opinion that the cortical projections from the thalamus are not established at twenty-four weeks (Id. at 158-59).

In regard to whether a fetus at twenty-four weeks can consciously experience pain, Dr. White noted that the problem is "what we consider consciousness." (Id. at 162). He did admit, however, that he did not know "at what particular stage in the gestational [age] ... that an infant is conscious." (Id. at 163).

Finally, Dr. White testified that the D & E procedure would also be painful for the fetus, although the nervous system is more formed at twenty to twenty-four weeks, when the D & E procedure is used on a less frequent basis (Id. at 164).

Based on this testimony, this Court concludes the following: first, there is evidence that a fetus of age twenty to twenty-four weeks will react, physiologically, to noxious stimuli. Second, the evidence is inconclusive as to whether the pain impulses are transmitted to the higher levels of the brain at that age. Third, the evidence is inconclusive as to whether the D & X procedure is more painful than the D & E procedure.[29]

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[29]The parties stipulated that at the beginning of the D & X procedure, some fetuses are dead, and some are alive. An

Finally, and most importantly, neither Dr. Conomy nor Dr. White testified that a fetus at age twenty to twenty-four

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exact definition of the term "alive" was neither stipulated, nor clarified by the evidence. Indeed, in some basic, elemental sense, the fetus is "alive" from the moment of conception. What is clear, however, is that "alive" does not mean "viable." Were alive to mean viable, the stipulation arguably would be transformed into an acknowledgment that the D & X procedure is more cruel than either the D & E procedure, or any other form of mid-second trimester pregnancy terminations.

Assuming arguendo that the fetus does feel pain, one factor which suggests that the D & E procedure might be more painful than the D & X procedure--the physical act of dismembering the fetus in the D & E, as opposed to a relatively quick incision and suctioning process in the D & X--is balanced by the younger age of the fetus during the D & E procedure, which is performed earlier in the second trimester, when the nervous system is not as fully developed.

Assuming that the D & X procedure is "cruel," however, this Court fails to see how it is more cruel than the D & E procedure--which involves the dismemberment of the fetus and, sometimes, the crushing of its skull--or how it is always cruel, given that the fetus may already be dead (see Defendant's Exhibit R). The State's banning of the D & X procedure thus raises a question of whether its purpose in so doing was to prevent unnecessary cruelty, as stated, or, rather, was to place a significant obstacle in the path of a woman seeking a pre-viability abortion in the mid-second trimester. Casey, 505 U.S. at 876-77, 112 S. Ct. at 2820. Cf. Danforth, 428 U.S. at 78, 96 S. Ct. at 2845 (discussing "the anomaly inherent in [the ban on saline amniocentisis] when it proscribes the use of saline but does not prohibit techniques that are many times more likely to result in maternal death").

weeks experiences a conscious awareness of pain. Although Defendants have suggested that there needn't be a conscious awareness of pain in order to conclude that the D & X procedure is "cruel," a finding that there is such a conscious awareness of pain on the part of the fetus does appear to be relevant to this Court; so, too, is the inability of the Court to make such a finding. Some might argue that abortion is always cruel because it ends in the death of the fetus; this, however, does not provide a basis for distinguishing between different methods of abortion. If the fetus does not perceive or experience the pain, then it is hard to see how the D & X procedure could be any more cruel than any other abortion method.

This Court recognizes that the subject of when a fetus attains consciousness is a matter of great debate, and that reasonable minds can differ on the issue. As the Supreme Court stated in Casey:

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.

112 S. Ct. at 2806. Until medical science advances to a point at which the determination of when a fetus becomes "conscious" can be made within a reasonable degree of certainty, neither doctors nor judges nor legislators can definitively state when an abortion procedure becomes "cruel," in the sense of when the fetus becomes aware of pain. That

judgment must be made by each individual member of society.

Given that there is no reliable evidence that the D & X procedure is more cruel than other methods of abortion, this Court is unable to conclude that the ban on the use of the D & X procedure serves the stated interest of preventing unnecessary cruelty to the fetus.[30] As in Danforth, the ban on the D & X procedure therefore "comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting," second-trimester abortions prior to viability. 428 U.S. at 79.

This conclusion does not, however, mean that the state cannot regulate the D & X procedure, short of an absolute ban. As discussed above, Plaintiff has demonstrated a substantial likelihood of success of showing that the ban on the D & X procedure is unconstitutional, because it imposes an undue

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[30]Before Casey, the State would have had to show that the ban on the D & X procedure was necessary to achieve a compelling state interest, under a strict scrutiny standard. After Casey, the State need only show that it has a legitimate interest, and that the challenged regulation "cannot be said [to] serve no purpose other than to make abortions more difficult." 505 U.S. at 901, 112 S. Ct. at 2833. This new approach appears to require courts to examine whether the challenged regulation serves the stated, legitimate purpose. See, e.g., Barnes v. Mississippi, 992 F.2d 1335, 1340 (5th Cir.) (holding that because the challenged two-parent consent statute helped to safeguard the interests of both parents and the family, it could not be said to serve no purpose other than to make abortions more difficult), cert. denied, 510 U.S. 976, 114 S. Ct. 468, 126 L.Ed.2d 419 (1993). Accordingly, this Court must examine whether the ban on the D & X procedure serves the purpose of preventing unnecessary cruelty to the fetus.

burden on the right to seek a pre-viability abortion, and because the definition of D & X is vague. Assuming, however, that the fetus is conscious of the pain involved in the D & X procedure, it appears to this Court that the state could still seek to vindicate its asserted interest in preventing arguably unnecessary cruelty to the fetus, by regulating the procedure without banning it outright.

Although the testimony on this issue was not conclusive, one such possible regulation may require the physician to cut the umbilical cord prior to making an incision in the base of the skull, and to wait until the fetus dies as a result. Another possible regulation might require the use of local or general anesthetic, on the fetus or the mother. By use of such regulations, states could prevent arguably unnecessary cruelty in the abortion procedure, without taking away the right to seek a pre-viability abortion. In enacting any regulation on the D & X procedure, however, states must bear in mind that they cannot reduce either the safety or the availability of the procedure. Such an effect would render the regulation unconstitutional under both Danforth and Casey.

D. The Ban on Post-Viability Abortions

1. Description of the Statute

Because the challenged ban on post-viability abortions is particularly complex, it is advisable to provide a detailed overview of all of the provisions before proceeding to analyze them individually.

House Bill 135 bans the performance of all post-viability abortions, unless:

> (1) the physician determines, in good faith and in the exercise of reasonable medical judgment, that the abortion is necessary to prevent the death of the pregnant woman or [medically necessary to prevent] a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman, [or]
>
> (2) the physician determines, in good faith and in the exercise of reasonable medical judgment, after making a determination relative to the viability of the unborn human in conformity with [§ 2919.18(A)], that the unborn human is not viable.

O.R.C. § 2919.17(A)(1-2). The statute defines a serious risk of the substantial and irreversible impairment of a major bodily function as follows:

> [A]ny medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function, including, but not limited to, the following conditions: (1) pre-eclampsia; (2) inevitable abortion; (3) prematurely ruptured membrane; (4) diabetes; (5) multiple sclerosis.

O.R.C. § 2919.16(J). This definition appears to limit the legality of post-viability abortions to situations where an abortion is required to preserve the woman's physical health, as opposed to her emotional or psychological health.

If the first exception applies (the abortion is medically necessary), the physician must conform with a number of requirements governing the performance of the abortion, unless

a medical emergency exists. The statute sets forth five specific conditions which must be satisfied:

> (a) the physician who performs ... the abortion certifies in writing that that physician has determined, in good faith and in the exercise of reasonable medical judgment, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.
>
> (b) the determination of [that] physician ... is concurred in by at least one other physician who certifies in writing that the concurring physician has determined, in good faith, in the exercise of reasonable medical judgment, and following a review of the available medical records of and any available tests pertaining to the pregnant woman, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.
>
> (c) the abortion is performed ... in a health care facility that has or has access to appropriate neonatal services for premature infants.
>
> (d) the physician ... terminate[s] the pregnancy in the manner that provides the best opportunity for the unborn human to survive, unless that physician determines, in good faith and in the exercise of reasonable medical judgment, that the termination of the pregnancy in that manner poses a significantly greater risk of the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman than would other available methods of abortion.

> (e) the physician ... has arranged for the attendance in the same room in which the abortion is to be performed ... of at least one other physician who is to take control of, provide immediate medical care for, and take all reasonable steps necessary to preserve the life and health of the unborn human immediately upon the unborn human's complete expulsion or extraction from the pregnant woman.

O.R.C. § 2919.17(B)(1)(a-e). These requirements may be summarized as follows: (1) the certification requirement, (2) the second physician concurrence requirement, (3) the neonatal facility requirement, (4) the choice of method requirement, and (5) the second physician attendance requirement.

In the event of a medical emergency, some or all of these requirements may be waived. The statute defines a medical emergency as:

> [A] condition that a pregnant woman's physician determines, in good faith and in the exercise of reasonable medical judgment, so complicates the woman's pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman that delay in the performance or inducement of the abortion would create.

O.R.C. § 2919.16(F). If a medical emergency exists, and is such that the physician cannot comply with one or more of the conditions, the physician may perform the abortion without fulfilling those statutory requirements.

The statute also creates a rebuttable presumption of viability at twenty-four weeks of gestational age. O.R.C. § 2919.17(C). The statute defines gestational age as:

> [T]he age of an unborn human as calculated from the first day of the last menstrual period of a pregnant woman.

O.R.C. § 2919.16(B).

A person who violates any of the above provisions is guilty of the crime of terminating a human pregnancy after viability, a fourth-degree felony. O.R.C. § 2919.17(D). In addition, that person may be civilly liable for compensatory and punitive damages. O.R.C. § 2307.52(B).

Plaintiffs have challenged seven separate provisions of this ban: (1) the determination of non-viability, (2) the definition of serious risk of the substantial and irreversible impairment of a major bodily function, (3) the definition of medical emergency, (4) the second physician concurrence requirement, (5) the choice of method requirement, (6) the second physician attendance requirement, and (7) the presumption of viability, including the statutory definition of gestational age. This Court will consider each of these challenges separately.

2. Determination of Non-viability

As noted, one exception to the ban on post-viability abortions allows a performance of a late-term abortion if the

fetus is determined not to be viable. House Bill 135 defines viable as:

> [T]he stage of development of a human fetus at which in the determination of a physician, based on the particular facts of a woman's pregnancy that are known to the physician and in light of medical technology and information reasonably available to the physician, there is a realistic possibility of the maintaining and nourishing of a life outside of the womb with or without temporary artificial life-sustaining support.

O.R.C. § 2919.16(L) (emphasis added). This definition appears to allow the physician to rely on his own best clinical judgment in determining whether a fetus is viable.

The statute directs, however, that the physician cannot perform a late-term abortion unless the fetus is non-viable, as determined in the following manner:

> [T]he physician determines, in good faith and in the exercise of reasonable medical judgment, that the unborn human is not viable, and the physician makes that determination after performing a medical examination of the pregnant woman and after performing or causing the performing of gestational age, weight, lung maturity, or other tests of the unborn human that a reasonable physician making a determination as to whether an unborn human is or is not viable would perform or cause to be performed.

O.R.C. § 2919.18(A)(1) (emphasis added). Under this provision, it appears that the physician cannot rely solely on his

or her own best clinical judgment in determining whether a fetus is viable; instead, that determination must be objectively reasonable as well, that is, reasonable to other physicians, as well as to the physician making the determination.[31]

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[31]The Court draws this conclusion for two reasons. First, if the term "in the exercise of reasonable medical judgment" were a subjective standard, referring to the physician's own judgment, there would be no need to also require the physician to act "in good faith." It is a maxim of statutory construction that no word or words should be construed in such a way that they are surplusage.

Second, the term "reasonable," as it is used in the law generally, almost always incorporates an objective standard. The term "reasonable belief," for example, is commonly used to indicate both that the actor himself holds a belief, and that a reasonable man would hold that belief under the same circumstances. Black's Law Dictionary 874 (6th ed. 1991). The term "reasonable care" means "that degree of care which a person of ordinary prudence would exercise in the same or similar circumstances." Id. at 875. The term "reasonable cause" refers to the "basis for arrest without warrant, [with] such state of facts as would lead a man of ordinary care and prudence to believe ... that the person sought to be arrested is guilty of committing a crime." Id. These examples, which are not exhaustive, demonstrate that the term "reasonable" generally indicates a requirement that the action be reasonable to others. Absent a clear statutory intent to the contrary, this Court must construe the term "in the exercise of reasonable medical judgment" as incorporating an objective standard.

Plaintiff argues that because one provision (the definition of "viable") suggests that a viability determination may be made based on a physician's own best clinical judgment, whereas another provision (the determination of non-viability) requires that determination to be reasonable to other physicians as well, the statute is unclear as to what standard will be applied, and, thus, is unconstitutionally vague. This Court agrees that the quoted provisions of the statute set forth different standards for judging the legality of the physician's determination, and, thus, that Plaintiff has demonstrated a substantial likelihood of success of showing that the determination of non-viability, as required to satisfy one exception to the post-viability ban, at O.R.C. § 2919.17(A)(2), is unconstitutionally vague, because it fails to provide the physician with fair warning of what legal standard will be applied, and, therefore, of what conduct will incur criminal and civil liability.[32]

3. Definition of "Serious Risk of Substantial and Irreversible Impairment of a Major Bodily Function"

The other exception to the post-viability ban requires a determination that the abortion is necessary to avert the death of the pregnant woman, or to avoid a serious risk of the

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[32]Standing alone, the statute's definition of viable would appear to be unobjectionable, because it contains a purely subjective standard. In contrast, it could be argued that the determination of viability is void, either because its lack of a scienter requirement creates vagueness, or because the objective reasonableness standard will chill the physician's determination of non-viability, and create an undue burden. For this reason, this Court holds that the determination of non-viability, but not the definition of viable, is unconstitutional.

substantial and irreversible impairment of a major bodily function. The statute defines the term "serious risk of the substantial and irreversible impairment of a major bodily function" as follows:

> [A]ny medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function, including, but not limited to, the following conditions: (1) pre-eclampsia; (2) inevitable abortion; (3) prematurely ruptured membrane; (4) diabetes; (5) multiple sclerosis.

O.R.C. § 2919.16(J). This definition appears to limit the legality of post-viability abortions to situations where an abortion is required to preserve the woman's physical health.

Plaintiff argues that this definition is too narrow, and does not allow the physician to consider other factors which relate to the woman's health, including psychological and emotional factors. Plaintiff cites to a Supreme Court abortion case decided before abortion was legalized in Roe v. Wade, which discussed a statute that outlawed abortions except where a doctor determined that the abortion was necessary to preserve the mother's life or health:

> We agree ... that the medical judgment may be exercised in the light of all factors--physical, emotional, psychological, familial, and the woman's age--relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

Doe v. Bolton, 410 U.S. 179, 192, 93 S. Ct. 739, 747, 35 L.Ed.2d 201 (1973). Plaintiff argues that House Bill 135 impermissibly limits the physician's discretion to determine whether an abortion is necessary to preserve the woman's health, because it limits the physician's consideration to medical factors relating to physical health.[33]

Defendant, however, cites to the Supreme Court's more recent decision in Casey, which upheld a similar definition of serious risk of the substantial and irreversible impairment of a major bodily function, that also limited the physician's determination to consideration of medical factors. 505 U.S. at 879-81, 112 S. Ct. at 2822. Defendant argues that the Supreme Court's decision in Casey governs here.

Plaintiff responds by pointing out that the challenged definition in Casey did not have the effect of preventing the performance of an abortion, altogether; instead, it merely allowed for an exception to the informed consent requirement, the 24-hour waiting period, and the parental consent provision.

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[33]The testimony in this case indicates that physicians do routinely consider non-medical factors that relate to health, when counseling women about having an abortion. Dr. Paula Hillard testified that she "takes into account the circumstances of the pregnancy which may be a result of rape or incest. So, I take into account the psychological health of the individual." (Tr., 11/8, at 29). Dr. John Doe Number Two testified that he deals with his patients "in a holistic approach, encompassing not only the physical consequences of the patient's particular situation, but encompassing her psychological well-being, both short and long term." (Tr., 12/7, at 22).

Thus, Plaintiff argues, the application of this definition to the challenged ban on post-viability abortions will have a more severe impact than it did in Casey, because it will completely prevent, and not merely delay, abortions that may be necessary to preserve the mother's overall health.

The testimony of Jane Doe Number Two is illustrative of how severe this impact may be. This witness testified to the pain and suffering she and her husband experienced when they discovered, during her twenty-second week of pregnancy, that their baby lacked a spine, had malfunctioning kidneys, and a clubbed foot (Tr., 12/6, at 151-53). A neonatal specialist advised them that after the baby was born, it would be paralyzed, at least from the waist down, would require immediate kidney dialysis, would need major surgery within thirty minutes of birth, and would probably be hydrocephalic (have water on the brain) (Id. at 154). Before this discovery, the witness testified that all indications pointed to an uneventful pregnancy (Id. at 155).

Jane Doe Number Two and her husband decided to terminate the pregnancy, rather than carry the baby to term. She explained their decision as follows:

> Just finding out about this, mentally, it just--it crushed both of us. We were excited. We wanted a baby very badly. We had prayed for a girl, and I guess there was guilt involved because maybe we didn't pray for [the baby to be] healthy. And you felt selfish.
>
> I kept thinking, What did I do? You know, I didn't smoke. I didn't drink. I was eating right. This has to be one of our fault's. It has to be somebody's fault in some way that we're going through this....
>
> I couldn't imagine mentally going to term. When I found this out, it was on a Friday, and I had my [abortion] procedure scheduled for Tuesday; and just,

> during that time, all we did was cry, we beat ourselves up about what could we have done differently, when there was nothing we could have done.
>
> I just--if I had to carry that baby to term, I am not sure I would have chosen to have children again.

Id. at 155-56. Jane Doe Number Two terminated her pregnancy by use of the D & X procedure, which was performed by Dr. Haskell. She testified that it was important to her that the fetus be intact, in order have an autopsy performed, and thereby to determine whether a genetic defect had caused the fetal anomalies (Id. at 158). The autopsy results indicated that the defect was not genetic. She and her husband have since had twin girls.

Under House Bill 135, it seems probable that a physician would have been forced to determine that Jane Doe Number Two's fetus had a realistic possibility of living after birth with life-sustaining support, although its prognosis was dismal. Therefore, if this Act had been in effect, Jane Doe Number Two would have been forced to carry her baby to term, because there was no threat to her physical health, even though it seems clear that this would have been very damaging to her mental and emotional health.

It is also possible that a pregnant woman who is faced with such a law, and who is carrying a fetus with severe anomalies, might feel forced to abort her pregnancy before her twenty-fourth week of pregnancy merely in order to avoid the ban, even if she would prefer to try some measure, such as fetal surgery, to mitigate or cure the anomaly.

This possibility is suggested by the testimony of another of Dr. Haskell's patients, Jane Doe Number One, who terminated her most recent pregnancy on November 30, 1995. She first learned that there was a problem in her sixteenth week

of pregnancy, when it was discovered that her baby had a bladder obstruction and could not urinate (Tr., 12/5, at 16-17). Once it was determined that the kidneys were functioning and that the baby was making good urine, this witness traveled to Detroit and underwent surgery to alleviate the bladder obstruction, in her eighteenth week (Id. at 17-18). That surgery was successful; however, the baby's ureter did not function properly, and the baby's right kidney failed as a consequence (Id.).

In her twentieth week of pregnancy, Jane Doe Number One traveled back to Detroit, and learned that her baby suffered from "prune belly syndrome." (Id. at 19). After reading about the syndrome and consulting with their physician, the witness and her husband learned that their baby only had a twenty percent chance of survival at birth, that he would need a kidney transplant, and that he would probably die before the age of two (Id. at 19-20).

Jane Doe Number One was now in her twenty-second week of pregnancy. She and her husband consulted with their own doctor and a pediatric urologist, and then decided to terminate the pregnancy. She explained why they decided to have an abortion:

> Because the prognosis was so poor. We had seen that the left kidney had already become involved, and the left ureter was dilated. So, we felt certain that that kidney was going to fail, and we felt that the baby was not going to survive.... It's terribly agonizing to have a baby growing inside of you and to feel him kick and to know that he won't live. It's terrible.

Id. at 21. During her twenty-fourth week of pregnancy, Jane Doe Number One received an abortion by use of the D & X

procedure, which was performed by Dr. Haskell. She compared her experience with the D & X procedure to a previous abortion by use of an induction procedure, by which she terminated another pregnancy with severe fetal anomalies:

> Physically ... there is no comparison. There was minimal pain. I was alert the entire time, and the procedure took, I would say, about an hour to an hour and a half. Physically, the [D & X] procedure is much--it's terrible to say it was easier or better, but the procedure was much easier to endure.

Id. at 22-23. She testified that it was definitely helpful to have the D & X procedure available to her (Id. at 24).

In addition, Jane Doe Number One expressed concern that House Bill 135 would have forced her to make a decision to terminate the baby before she had the opportunity to do everything possible to save it:

> In our situation, the kidneys were involved, and ... the baby's kidneys don't function until week sixteen or eighteen. So, therefore, we would not have known, or couldn't know, that there was a problem and totally tried to help the baby and make him a viable baby prior to that time. We'd have lost the opportunity.... We wouldn't have had a choice, or as many choices.

Id. Because her physical health would not have been threatened by carrying the baby to term, Jane Doe Number One would not, under House Bill 135, have been permitted to terminate her pregnancy after her baby was deemed to be viable.

The testimony of these two witnesses demonstrates the problems with House Bill 135's narrow definition of "serious risk of the substantial and irreversible impairment of a major bodily function," and its limitation to strictly medical factors. First, as in the case of Jane Doe Number Two, this definition will force women to carry babies to term which are likely to die before birth or immediately thereafter, or which have a prognosis so poor that its parents feel it would be best to terminate the pregnancy. This result could have a severe, negative impact on the mental and emotional health of the pregnant woman, as well as on the mental and emotional health of the baby's father. Second, as in the case of Jane Doe Number One, the possibility of being required to carry a severely deformed fetus to term might prompt pregnant women who are carrying fetuses with severe anomalies to abort before their twenty-fourth week, simply in order to avoid the ban, even if they would prefer first to attempt some measures to improve their baby's chances of survival.

Finally, although there was no direct testimony from a victim of rape or incest, Dr. Hillard did testify about an eleven-year-old victim of incest, whose pregnancy was not diagnosed until approximately her twenty-second week, at which time legal charges were brought against her father (Tr., 11/8, at 52). The girl and her mother then requested that the pregnancy be terminated, and Dr. Hillard performed the procedure. Under House Bill 135, Dr. Hillard would have had to perform viability testing before terminating the pregnancy; if the fetus had been adjudged to be viable, and there were no physical threat to the girl's health, she would have been forced to carry her pregnancy to term. In this Court's view, it is inconceivable that the act of being forced to bear her father's child, could have failed to have a severe, negative, and lasting impact on this girl's emotional and psychological health.

The issue of whether a state may ban post-viability abortions except where necessary to preserve the woman's physical health, even if carrying the baby to term would cause her to suffer severe mental or emotional harm, appears to be an issue of first impression before this, or any, Court.

Under the authority of Doe v. Bolton, discussed above, this Court holds that a state may not constitutionally limit the provision of abortions only to those situations in which a pregnant woman's physical health is threatened, because this impermissibly limits the physician's discretion to determine what measures are necessary to preserve her health.[34] Casey is not dispositive of this issue, because it only considered restrictions which delayed, but did not prevent, pre-viability abortions; whereas, in this case, the statute will completely prevent the performance of post-viability abortions that may, in appropriate medical judgment, be necessary to preserve the health of the pregnant woman. Under Casey, such a regulation is clearly unconstitutional. 112 S. Ct. at 2821. Accordingly, Plaintiff has demonstrated a substantial likelihood of success of showing that the Act's definition of "serious risk of the substantial and irreversible impairment of a major bodily

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[34]In addition, as highlighted by Jane Doe Number One's testimony, an exception which is limited only to preserving the pregnant woman's physical health may run the risk of impermissibly limiting the physician's discretion--and the mother's decision--to take whatever steps may be helpful (surgical or otherwise) in dealing with the specific problems facing that unborn child.

function," which is limited to strictly medical factors in application to the ban on post-viability abortions, is unconstitutional.[35]

4. Definition of "Medical Emergency"

In its explanation of its Temporary Restraining Order, granted on November 13, 1995, this Court stated that Plaintiff had demonstrated a substantial likelihood of success of showing that the medical emergency definition was unconstitutional on two grounds: first, it lacked a mens rea, or scienter, requirement, and therefore was vague; second, it did not allow physicians to rely solely on their own best clinical judgment in determining that a medical emergency existed, and so would chill physicians from exercising their best medical judgment in deciding whether such an emergency exists.[36]

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[35]As discussed in an earlier part of the opinion, this Court concludes that it need not apply the Salerno standard to restrictions on post-viability abortions, and that a pregnant woman may therefore succeed in a facial challenge to such a regulation, even if she cannot show that "no set of circumstances exists under which the law would be valid."

[36]On this point, it is significant that, as far as this Court is aware, no other court has been confronted with a medical emergency definition that includes an objective requirement, and therefore does not permit the physician to rely solely on his or her best clinical judgment.

This objective requirement seems certain to create a chilling effect--particularly given the lack of a scienter requirement. Even if the statute had a scienter requirement, it might still have a chilling effect, though to a lesser extent, given that the physician would still be subject to prosecution if other physicians disagreed with his or her determination. This

Most of that discussion will be repeated here. In addition, the Court will address the effect of O.R.C. § 2901.21, which could potentially allow this Court to import a scienter requirement of "recklessness" into the medical emergency definition.

Before turning to the Act itself, it is advisable to define the meaning of the terms "scienter" and "mens rea ", and to describe their importance in the law. The term "scienter" means "knowingly" and is "frequently used to signify the defendant's guilty knowledge." Black's Law Dictionary 1207 (5th ed.1979). The term "mens rea " refers to a "guilty mind, a guilty or wrongful purpose, a criminal intent." Id. at 889. Both of these terms require that a defendant have some degree of guilty knowledge, or some degree of blameworthiness or culpability, in order to be criminally liable. Statutes which do not contain such a requirement, and which impose criminal liability even if the defendant did not knowingly violate the law, or did not have a culpable state of mind, are known as "strict liability" statutes.

There is a strong presumption in our law favoring a mens rea or scienter requirement in statutes which create criminal liability. See Staples v. United States, 511 U.S. 600, ----, 114 S. Ct. 1793, 1797, 128 L.Ed.2d 608 (1994) ("we must construe the statute in light of the background rules of common law ... in which the requirement of some mens rea for a crime is firmly embedded"); United States v. United States Gypsum Co., 438 U.S. 422, 437-38, 98 S. Ct. 2864, 2873-74, 57 L.Ed.2d 854 (1978) ("the limited circumstances in which Congress has created and this Court has recognized [strict-liability] offenses ... attest to their generally disfavored status"); Dennis v. United States, 341 U.S. 494, 500, 71 S. Ct. 857, 862, 95 L.Ed. 1137

Court therefore takes no position on whether an objective requirement in a medical emergency definition, with or without a scienter requirement, is also void for vagueness.

(1951) ("the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence"). The rationale for this presumption was eloquently set forth by Justice Jackson:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to"....
>
> The unanimity with which [courts] have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element ... [including] such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "willfulness," "scienter," to denote guilty knowledge, or "mens rea," to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.

Morissette v. United States, 342 U.S. 246, 250-52, 72 S. Ct. 240, 243-44, 96 L.Ed. 288 (1952) (emphasis added). Although the presumption favoring a mens rea requirement is not as strong in statutes creating civil liability, because House Bill 135 imposes civil and criminal liability for the same actions, this Court must analyze the provisions of the Act in light of the presumption of a mens rea requirement. Having described the meaning and importance of a "guilty knowledge" requirement

in laws creating criminal liability, this Court now turns to House Bill 135.

The medical emergency exception, which is defined in Ohio Revised Code Section 2919.16(F), is employed in the ban on post-viability abortions. This Court concludes that because, under the definition of medical emergency, a physician may not rely alone on his own good-faith clinical judgment in determining that a medical emergency exists, and because both the medical emergency definition and provisions imposing criminal liability for violations of Section 2919.17 lack scienter requirements, Plaintiff has demonstrated a substantial likelihood of success of showing that the medical emergency definition in the Act is unconstitutional.

House Bill 135 defines a medical emergency as follows:

> "Medical emergency" means a condition that a pregnant woman's physician determines, in good faith and in the exercise of reasonable medical judgment, so complicates the woman's pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman that delay in the performance or inducement of the abortion would create.

O.R.C. § 2919.16(F) (emphasis added). This definition includes subjective and objective requirements: the physician must believe, himself, that the abortion is necessary, and his belief must be objectively reasonable to other physicians. Under this definition, a finding that the physician failed to act in good faith is therefore not necessary to impose civil and

criminal liability. One could act in good faith and according to one's own best medical judgment, and yet incur civil and criminal liability if, after the fact, the exercise of that medical judgment is determined by others to have been not objectively reasonable. In other words, physicians need not act willfully or recklessly in determining that a medical emergency exists in order to incur criminal liability; instead, they face liability even if they act in good faith, and according to their own best (albeit, in the later opinion of others, mistaken) medical judgment. Thus, this definition appears to create strict liability, that is, liability even if the physician acts in good faith, and without a culpable mental state, to comply with the statute.

Although this Court is unaware of any case which has considered the constitutionality of a similar provision, there are three cases which this Court finds to be relevant. In Colautti v. Franklin, 439 U.S. 379, 396, 99 S. Ct. 675, 686, 58 L.Ed.2d 596 (1979), the Supreme Court held unconstitutional a Pennsylvania provision which required physicians to determine non-viability before performing an abortion. If a physician failed to abide by specific requirements where there was "sufficient reason" to believe that the fetus "may be viable," he was civilly and criminally liable. Id. at 394, 99 S. Ct. at 685. No language in the statute indicated that liability was to be predicated on a culpable state of mind. Id. at 380 n. 1. The determination of non-viability was to be based on the physician's "experience, judgment, or professional competence." Id. at 380 n. 1.

In concluding that the provision did not contain a scienter requirement, the Court found that neither Pennsylvania criminal law nor the Act itself "requires that the physician be culpable in failing to find sufficient reason to believe that the fetus may be viable." Id. at 394-95, 99 S. Ct. at 685. The Court also noted that the subjective standard in the Act which is "keyed to the physician's individual skills and abilities ... is

different from a requirement that the physician be culpable or blameworthy for his performance...." Id. at 395 n. 12. The Supreme Court then held the provision void for vagueness due to its lack of a mens rea requirement:

> This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea. Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more than a 'trap for those who act in good faith.'
>
> The perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself. As the record in this case indicates, a physician determines whether or not a fetus is viable after considering a number of variables.... In the face of these uncertainties, it is not unlikely that experts will disagree.... The prospect of such disagreement, in conjunction with a statute imposing strict civil and criminal liability for an erroneous determination of viability, could have a profound chilling effect on the willingness of physicians to perform abortions ... in the manner indicated by their best medical judgment.

Id. at 395-96, 99 S. Ct. at 686 (citations omitted) (emphasis added).

Colautti is directly applicable to this case, insofar as the determination of whether a medical emergency exists is similarly fraught with uncertainty, and is therefore equally susceptible to being disputed by experts at a later date, thereby resulting in criminal liability even where the physician acted in

good faith. As noted, the medical emergency exception in House Bill 135 contains both a subjective and an objective requirement. Because both of these requirements must be met in order for the physician to avoid liability, and because there is no scienter requirement in this provision, a physician who performs a post-viability abortion under the medical emergency exception may be held liable even if he or she acted in good faith, as long as the physician was later determined, in the eyes of others, using 20/20 hindsight, to have acted unreasonably. Plaintiffs have demonstrated a substantial likelihood of success of showing that, given the short amount of time in which every decision regarding a medical emergency must be made, and given the varying, highly individual factors which must be considered for each case, it is not unlikely that even where a physician acts in good faith, experts may later disagree as to the existence, immediacy, or extent of a medical emergency. As in Colautti, this prospect of disagreement, combined with the strict civil and criminal liability for even good-faith determinations, could chill physicians from performing post-viability abortions even where it is their best medical judgment that an abortion is required to preserve the life or health of a patient.

In so finding, this Court acknowledges that the "undue burden" analysis in Planned Parenthood v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992), applies only to pre-viability abortions, and therefore does not apply to this provision governing the performance of post-viability abortions. Although it may seem that this would render any "chilling effect" irrelevant, this is manifestly not the case. In Casey, the Supreme Court recognized that the State's interest in the life of the fetus allows it to regulate or proscribe abortions after viability, except "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 505 U.S. at 879, 112 S. Ct. at 2821. Such is the situation here. If physicians were chilled from acting according

to their own best medical judgment when determining whether a post-viability abortion is necessary to save the life of the mother, and were forced to resolve even the smallest doubt in favor of a refusal to act, this could have a profound, negative impact on the State's interest in preserving the life and health of the mother, and on the pregnant woman's interest in her own life and health. It is this Court's belief that such a situation would offend the Constitution to an even greater degree than those situations in which a chilling effect precludes the performance of elective pre-viability abortions, which are not necessary to preserve the mother's life or health. Therefore, the analysis in Colautti is applicable to this case.

A more recent case which addresses this issue is Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452 (8th Cir.1995). In that case, the Court invalidated provisions regarding the performance of abortions which created civil and criminal liability for violations of South Dakota's parental-notice, mandatory-information, and medical-emergency requirements. The medical emergency provision in that case did not require the physician either to act in good faith, or to apply reasonable medical judgment; instead, it merely provided:

> If a medical emergency compels the performance of an abortion, the physician shall inform the female, prior to the abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or that delay will create serious risk of substantial and irreversible impairment of a major bodily function.

Id. at 1455 n. 4. Other provisions imposed civil and criminal liability for violation of the medical emergency provision:

> [§ 34-23A-22] If an abortion occurs which is not in compliance with [the medical emergency provision], the person upon whom such an abortion has been performed ... may maintain an action against the person who performed the abortion for ten thousand dollars in punitive damages and treble whatever actual damages the plaintiff may have sustained.
>
> [34-23A-10.2] A physician who violates [the medical emergency provision] is guilty of a Class 2 misdemeanor.

Id. at 1455-56 n. 5-6. None of these provisions contained a scienter or mens rea requirement on their face.

The District Court found that the provision creating criminal liability lacked a mens rea requirement, which "made it unconstitutionally vague, creating a 'chilling effect' so that physicians, who cannot guess the standard under which the courts will judge their conduct, would choose not to act at all." Id. at 1463. The District Court also invalidated the civil liability provision on similar grounds, after concluding that strict civil liability created an undue burden because it made it unlikely that any physician would perform abortions. Id.

The Eighth Circuit affirmed the lower court's decision, due to the statute's lack of a scienter requirement. It agreed that the provision creating criminal liability would create an undue burden by chilling the willingness of physicians to perform abortions. Id. at 1465. It further agreed that the provision creating civil liability--which did not require a

finding that the defendant acted willfully, wantonly, or maliciously, before awarding punitive damages--was invalid:

> The potential civil liability for even good-faith, reasonable mistakes is more than enough to chill the willingness of physicians to perform abortions in South Dakota. We therefore hold that [this provision] is an undue burden on a woman's right to choose whether to terminate her pre-viability pregnancy.

Id. at 1467.

As noted, the medical emergency exception in House Bill 135 could impose civil and criminal liability even where the physician acted in good faith. Plaintiffs have demonstrated a substantial likelihood of success of showing that, given the fact that reasonable physicians might disagree as to the existence or immediacy of a medical emergency, this provision would create liability even for good-faith, reasonable mistakes. As in Miller, this result would chill the willingness of physicians to perform post-viability abortions even where they are necessary, in a medical emergency, to preserve the life and health of the mother.

A third case which supports this Court's findings is the Eighth Circuit's decision to uphold the North Dakota definition of a medical emergency, because it allowed the physician to rely on his or her own "best clinical judgment" in determining whether an emergency existed, and because the statute contained a scienter requirement. Fargo Women's Health Org. v. Schafer, 18 F.3d 526, 534 (8th Cir.1994) ("It is the exercise of clinical judgment that saves the statute from vagueness ... In addition, the North Dakota Act contains a scienter requirement that we believe prevents a finding of vagueness."). Accord

Barnes v. Moore, 970 F.2d 12, 15 (5th Cir.1992) (upholding medical emergency definition which allowed physician to rely on "best clinical judgment" and contained scienter requirement for imposition of criminal liability). The statute at issue in Schafer defined a "medical emergency" as:

> that condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate an immediate abortion to avert the death of the mother or for which a twenty-four hour delay will create grave peril of immediate and irreversible loss of major bodily function.

Id. at 527, n. 3 (emphasis added). Although the North Dakota statute did not expressly contain a scienter requirement, North Dakota criminal statutes which neither specify culpability, nor explicitly provide that culpability is not required, are construed as requiring a "willful" violation of the statute, which is further defined as conduct done "intentionally, knowingly, or recklessly." Id. at 534-35. Thus, although the statute containing the medical emergency definition was silent on the question of intent, the Eighth Circuit imported a scienter requirement into the statute.

The medical emergency definition in House Bill 135 differs in two significant respects from the definition in Schafer. First, the definition in House Bill 135 does not allow the physician to rely solely on his or her own best, good-faith medical judgment; instead, in addition to requiring that he or she act in good faith, it requires the physician to apply "reasonable medical judgment," which is an objective requirement, subject to second-guessing by other physicians. Second, the medical emergency provision creates strict liability because it lacks a scienter requirement; in addition, the provisions creating criminal liability for violations of the ban

on post-viability abortions, and of the viability testing requirement--both of which apply the medical emergency exception--lack scienter requirements. Therefore, the medical emergency exception in House Bill 135 appears to fail both of the tests upon which the North Dakota definition was held to be valid.

In its earlier opinion which explained its Temporary Restraining Order, this Court incorrectly stated that Ohio law does not allow courts to import a scienter requirement into criminal statutes that are silent on the issue of whether intent is a required element, relying on State v. Curry, 43 Ohio St.2d 66; 330 N.E.2d 720 (1975) ("If the statute is silent on the question of intent, intent is not an element of the crime."). Plaintiff correctly pointed out that an Ohio law enacted immediately prior to Curry (although inapplicable to the facts in Curry, which arose prior to the effective date of the statute) might, however, allow this Court to import a scienter requirement into the medical emergency definition, even though that definition does not include any intent requirement. Section 2901.21(B) of the Ohio Revised Code provides that:

> When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

Thus, if the statute does not plainly indicate an intent to impose strict liability, Ohio courts could import a scienter requirement of recklessness into the statute.

For two reasons, it is this Court's opinion that Ohio courts would decline to import a recklessness standard into the statute's requirement that a physician act "in the exercise of reasonable medical judgment" when determining whether a medical emergency exists.

First, both sections of the statute which apply the medical emergency definition--the ban on post-viability abortions, and the viability testing requirement, discussed infra--plainly indicate an intention to impose strict liability. Both of these sections state that "no person shall" perform the proscribed acts, and fail to specify any mental state. Ohio courts have held that similar laws which lack culpable mental states, and contain the term "no person shall ...," plainly indicate an intention to impose strict liability. State v. Cheraso, 43 Ohio App.3d 221, 223, 540 N.E.2d 326 (1988); Village of Bridgeport v. Bowen, 1995 Ohio App. LEXIS 3892, at *6 (Ohio Ct.App.1995). In addition, it is significant that although the post-viability ban and the viability testing requirement lack scienter requirements, the ban on use of the D & X procedure does contain a scienter requirement.[37] Ohio courts have held if portions of a statute specify a culpable mental state, whereas other portions of the statute are silent as to the culpable mental state, this is a plain indication of an intent to impose strict liability in the latter sections or portions. State v. Wac, 68 Ohio St.2d 84, 87, 428 N.E.2d 428 (1981); City of Brecksville v. Marchetti, 1995 Ohio App. LEXIS 5164 (Ohio Ct.App.1995). Based on the foregoing, this Court finds that the ban on post-viability abortions, and the viability testing requirement, "plainly indicate" an intention to create strict liability.

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[37]O.R.C. § 2919.15(B) provides: "No person shall knowingly perform or attempt to perform a Dilation and Extraction procedure upon a pregnant woman." (emphasis added). This demonstrates that the General Assembly knows how to include a scienter requirement when that is its intention.

Even if this were not the case, however, Ohio courts would be unable to import a recklessness requirement without, in effect, rewriting the statute. This is because the statute's standard of "reasonableness," which imposes criminal liability if a physician acts unreasonably in determining that a medical emergency exists, is a lower standard for incurring criminal liability, from the perspective of the actor, than the standard of "recklessness."[38] If courts were to import a recklessness requirement into the medical emergency definition per the above-quoted section 2901.21(B), physicians would no longer be liable if they acted unreasonably, i.e., negligently; instead, they would have to act recklessly in order to be liable. This would contradict the legislature's intent to create liability if a physician fails to act "in the exercise of reasonable medical judgment," and would amount to rewriting the statute, which courts may not do. Therefore, this Court concludes that a scienter requirement may not be imported into the definition of medical emergency.

On the basis of the foregoing, this Court concludes that the Plaintiffs have shown a substantial likelihood of demonstrating that the medical emergency exception in O.R.C. § 2919.16(F) is unconstitutional on two grounds: first, it

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[38]The difference between the two standards is most easily discernible in the area of tort law. As an example, a physician who commits medical malpractice may be found guilty of negligence if he acts unreasonably. If he acts recklessly, however, he may be found guilty of gross negligence, which is a more serious offense, and exposes the physician to a greater degree of liability. See, e.g., Gearhart v. Angeloff, 17 Ohio App.2d 143; 244 N.E.2d 802 (1969) ("Punitive damages may be recovered in an action for negligence where such negligence is so gross as to show a reckless indifference to the rights and safety of other persons.") (quoting syllabus).

appears to be vague, because both the definition of medical emergency, and the provisions imposing criminal (and civil) liability for violations of the post-viability bar: and the viability testing requirement, lack scienter requirements; second, the requirement that a physician's determination be objectively reasonable--that is, reasonable to other physicians--would appear to create a chilling effect that would prevent physicians from performing post-viability abortions where, in their own best judgment, an abortion is necessary to preserve the life or health of the mother.

5. Second Physician Concurrence Requirement

If it is determined that a post-viability abortion is necessary to save the life of the mother, or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the mother, the physician who performs the abortion must comply with a number of conditions governing the performance of the abortion. One of these provisions requires that at least one other doctor concur, in writing, as to the necessity of the abortion:

> The determination of the physician who performs ... the abortion ... is concurred in by at least one other physician who certifies in writing that the concurring physician has determined, in good faith, in the exercise of reasonable medical judgment, and following a review of the available medical records of and any available tests [sic] results pertaining to the pregnant woman, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.

O.R.C. § 2919.17(B)(1)(b). Plaintiff argues that this requirement is unconstitutional because it undermines the physician's judgment, imposes unnecessary and cumbersome delays, and will be difficult to satisfy because few physicians will be willing to concur, in writing, to an abortion's necessity.[39]

In Doe v. Bolton, the Supreme Court struck down a Georgia statute which required a physician to obtain confirmation of his decision to perform an abortion, from two other doctors. The Court reasoned that this requirement interfered with the physician's clinical judgment and discretion:

> The statute's emphasis ... is on the attending physician's 'best clinical judgment that an abortion is necessary.' That should be sufficient. The reasons for the presence of the confirmation step in the statute are perhaps apparent, but they are insufficient to withstand constitutional challenge.... If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure and deprivation of his license are available remedies. Required

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[39]The testimony by doctors who perform late-term abortions indicates that this may be a valid concern. Dr. John Doe Number One testified that it would be "virtually impossible" to find a second physician who would be willing to certify in writing that an abortion is necessary: "No one wants to involve themselves in the issue. I think ... whether it would be fear of personal harm, whether it would be fear of being ostracized, fear of picketing, who would want to involve themselves in this issue. It would be much easier to ignore it rather than to have your name on that chart." (Tr., 12/5, at 51).

> acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice.

410 U.S. at 199, 93 S. Ct. at 751. This holding by the Supreme Court appears to govern the analysis of the concurrence requirement in this case, and Defendants have made no argument as to why it should not so apply. Accordingly, this Court finds that Plaintiff has demonstrated a substantial likelihood of success of showing that the second physician concurrence requirement in House Bill 135 is unconstitutional, because it impermissibly interferes with the physician's discretion.

Additionally, it appears to this Court that this requirement may be unconstitutional for the same reasons which render the medical emergency definition likely to be unconstitutional; to wit, the requirement that a second physician concur "in good faith [and] in the exercise of reasonable medical judgment" imposes criminal and civil liability on such concurring physicians who act according to their own best clinical judgment, without any criminal intent. This is likely to create a chilling effect which will deter physicians from concurring, in writing, that an abortion is medically necessary; this will chill the performance of abortions which are necessary to preserve the life or health of the mother. Accordingly, this Court finds that Plaintiff has demonstrated a substantial likelihood of success of showing that the second physician concurrence requirement in House Bill 135 is unconstitutional, because it is likely to chill the performance of post-viability abortions which are necessary to preserve the life or health of the mother.

6. Choice of Method Requirement

Under House Bill 135, another condition which must be satisfied by a doctor performing a post-viability abortion is the so-called "choice of method" requirement:

> The physician who performs ... the abortion terminates ... the pregnancy in the manner that provides the best opportunity for the unborn human to survive, unless that physician determines, in good faith and in the exercise of reasonable medical judgment, that the termination of the pregnancy in that manner poses a significantly greater risk of the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman than would other available methods of abortion.

O.R.C. § 2919.17(B)(1)(d) (emphasis added). Plaintiff argues that the requirement that a particular method of abortion be used unless it would pose a significantly greater risk of harm to the woman, is unconstitutional, because it requires the physician to "trade off" the woman's health for that of the fetus.

In Colautti v. Franklin, 439 U.S. 379, 400, 99 S. Ct. 675, 688, 58 L.Ed.2d 596 (1979) the Supreme Court held that a statute which "requires the physician to make a 'trade-off' between the woman's health and additional percentage points of fetal survival" posed serious ethical and constitutional difficulties.

Later, in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 769, 106 S. Ct. 2169, 2183, 90 L.Ed.2d 779 (1986), the Supreme Court

invalidated a "choice of method" provision which was remarkably similar to the challenged provision in House Bill 135, reasoning that the words "significantly greater medical risk" required the woman to bear an additional, increased risk to her health, and so was unconstitutional. The provision at issue in Thornburgh read:

> Every person who performs or induces an abortion after an unborn child has been determined to be viable shall exercise that degree of professional skill, care and diligence ... and the abortion technique employed shall be that which would provide the best opportunity for the unborn child to be aborted alive unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman.... Any person who intentionally, knowingly, or recklessly violates that provisions of this subsection commits a felony of the third degree.

476 U.S. at 768 n. 13, 106 S. Ct. at 2182 n. 13 (emphasis added). The only differences between this statute and the one at issue in the present case are: first, that the provision in Thornburgh allowed the physician to rely solely on his best clinical judgment, whereas the provision in House Bill 135 does not; second, that the statute in Thornburgh required a culpable mental state in order to impose criminal liability, whereas House Bill 135 does not require any criminal intent. The Thornburgh provision therefore seems far less egregious than that in House Bill 135, which, because it does not allow the physician to rely solely on his or her best clinical judgment, and imposes criminal liability even if there were no criminal intent, seems likely to have a chilling effect on the physician's exercise of discretion in determining which abortion method

may be used without causing a "significantly" greater risk to the woman's health. This chilling effect would negatively impact the woman's life and health. Accordingly, this Court finds that Plaintiff has demonstrated a substantial likelihood of success of showing that the choice of method provision in House Bill 135 is unconstitutional, because it will impermissibly interfere with the physician's exercise of discretion, to the detriment of the pregnant woman's health.

Given the similarity between the provision in Thornburgh and the challenged provision in this case, this Court further finds that Plaintiff has demonstrated a substantial likelihood of success of showing that the choice of method requirement is unconstitutional, because it "trades off" the health of the mother for that of the fetus, and requires her to bear an increased medical risk.

7. Second Physician Attendance Requirement

Another requirement in House Bill 135 pertaining to the provision of post-viability abortions requires that a second physician be present when the abortion is performed, to care for the fetus:

> The physician who performs ... the abortion has arranged for the attendance in the same room in which the abortion is to be performed ... of at least one other physician who is to take control of, provide immediate medical care for, and take all reasonable steps necessary to preserve the life and health of the unborn human immediately upon the unborn human's complete expulsion or extraction from the pregnant woman.

O.R.C. § 2919.17(B)(1)(e). Plaintiff also challenges the constitutionality of this provision.

The Supreme Court has considered similar provisions in two cases. In Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476, 485-86, 103 S. Ct. 2517, 2522, 76 L.Ed.2d 733 (1983), the Supreme Court upheld a second physician attendance requirement because it served the state's compelling interest in preserving the life of the fetus. Although there was no clear medical emergency exception in that statute, the Court construed the requirement as allowing for an exception in medical emergencies. 462 U.S. at 485 n. 8, 103 S. Ct. at 2522 n. 8. In Thornburgh, however, the Court struck down a second physician attendance requirement, because it did not contain a valid medical emergency exception. 476 U.S. at 771, 106 S. Ct. at 2184. Therefore, the constitutionality of the second physician attendance requirement in House Bill 135 appears to depend upon the validity of the statute's medical emergency exception.

As discussed above, this Court has found that Plaintiff has demonstrated a substantial likelihood of success of showing that the medical emergency exception in House Bill 135 is unconstitutional, because it lacks a scienter requirement, and is thus vague, and because its objective reasonableness standard will chill physicians from determining that a medical emergency exists. For that reason, this Court finds that Plaintiff has also demonstrated a substantial likelihood of success of showing that the second physician attendance requirement in House Bill 135 is unconstitutional.[40]

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[40]In this Court's opinion, the chilling argument which applied to the second physician concurrence requirement would not apply to this requirement, which does not require the second physician to give a written endorsement of the abortion,

8. Rebuttable Presumption of Viability

For purposes of the ban on post-viability abortions, House Bill 135 creates a rebuttable presumption "that an unborn child of at least twenty-four weeks of gestational age is viable." O.R.C. § 2919.17(C). The statute defines gestational age as "the age of an unborn human as calculated from the first day of the last menstrual period of a pregnant woman." O.R.C. § 2919.16(B).

Plaintiff challenges this requirement on three grounds. First, Plaintiff argues that a rebuttable presumption of viability impermissibly limits the physician's discretion to determine viability. Second, Plaintiff argues that because the last menstrual period (LMP) method of calculating gestational age generally produces an age that is two weeks earlier than the age from conception, the presumption actually attaches at twenty-two weeks, when fetuses are not viable, and so is necessarily invalid. Finally, Plaintiff argues that because the presumption can only be rebutted after the physician is arrested and prosecuted, it will chill physicians from determining that fetuses of a gestational age of twenty-four or more weeks are not viable, and will constitute an undue burden on the right to seek a pre-viability abortion.

This Court declines to consider the likelihood of success of any of these arguments. Although the Supreme Court's decision in Webster v. Reproductive Health Services, 492 U.S. 490, 109 S. Ct. 3040, 106 L.Ed.2d 410 (1989), indicates that it may be constitutionally permissible for a state to impose a

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and merely requires him or her to perform the arguably laudable role of caring for the fetus.

rebuttable presumption of viability,[41] this Court finds it unnecessary to reach this issue at this time, because, as was discussed supra, Plaintiff has demonstrated a substantial likelihood of success of showing that the determination of non-viability in House Bill 135 is unconstitutionally vague, as the objective standard in that determination conflicts with the purely subjective standard in the statute's definition of viable in O.R.C. § 2919.16(L). If this Court determines, after a hearing on the merits, that the determination of non-viability is unconstitutional, then any portion of the statute which requires a physician to either determine viability, or rebut a presumption of viability, must, likewise, be invalidated. Accordingly, the Court finds it unnecessary to reach any of Plaintiff's arguments, in order to find that Plaintiff has demonstrated a substantial likelihood of success of showing that the rebuttable presumption of viability is unconstitutional, for the reason that the statute's mandated determination of non-viability is invalid.

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[41]In Webster, a five-member majority of the Supreme Court upheld a viability testing requirement that attached at the twentieth week of pregnancy. Although the challenged statute also imposed "what is essentially a presumption of viability at 20 weeks," id. at 515, 109 S. Ct. at 3055, Justice O'Connor pointed out in her concurring opinion that the constitutionality of that presumption was not an issue before the Court. Id. at 526, 109 S. Ct. at 3061. Justice O'Connor did state, however, that, in her opinion, an argument that this presumption of viability impermissibly restricted the judgment of the physician would probably be unsuccessful. Id. at 527, 109 S. Ct. At 3061.

E. Viability Testing Requirement

The third major portion of House Bill 135 creates a viability testing requirement at the twenty-second week of pregnancy, which must be complied with before an abortion after that time may be performed:

> Except as provided in [the medical emergency exception], no physician shall perform ... an abortion upon a pregnant woman after the beginning of her twenty-second week of pregnancy unless, prior to the performance [of] ... the abortion, the physician determines, in good faith and in the exercise of reasonable medical judgment, that the unborn human is not viable, and the physician makes that determination after performing a medical examination of the pregnant woman and after performing or causing the performing of gestational age, weight, lung maturity, or other tests of the unborn human that a reasonable physician making a determination as to whether an unborn human is or is not viable would perform or cause to be performed.

O.R.C. § 2919.18(A)(1). In addition to performing these tests, the physician may not perform the abortion "without first entering the determination ... and the associated findings of the medical examination and tests described ... in the medical records of the pregnant woman." § 2919.18(A)(2). The physician need not comply with either of these requirements if a medical emergency exists. § 2919.18(A)(3). Violation of this section of the Act is a fourth degree misdemeanor. § 2919.18(B).

Although a viability testing requirement was upheld in Webster, 492 U.S. at 490, 109 S. Ct. at 3041, the viability testing requirement in House Bill 135 appears to be unconstitutional for two reasons. First, for the reasons given in an earlier part of this opinion, the statute's determination of non-viability appears to be unconstitutionally vague. Second, for the reasons also given in an earlier part of this opinion, the definition of medical emergency appears to lack a mens rea requirement, which creates vagueness, and also appears likely to create a chilling effect that would unconstitutionally jeopardize the life or health of pregnant women needing an abortion, due to its requirement that a physician's determination that a medical emergency exists be objectively reasonable.

Accordingly, Plaintiff has demonstrated a substantial likelihood of success of showing that the challenged viability testing requirement is unconstitutional, for two reasons. First, it lacks a valid medical emergency exception. Second, the definition of viable in O.R.C. § 2919.16(L), which applies to this viability testing requirement,[42] allows the physician to rely solely on his or her own best clinical judgment, whereas this mandated determination of non-viability also imposes a requirement that the physician's determination be objectively reasonable; this conflict creates an ambiguity which appears to render this portion of the Act unconstitutionally vague, because the physician has no clear guidance as to what standard will be applied in judging whether he or she is criminally and civilly liable.

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[42]The definitions in O.R.C. § 2919.16 apply both to the post-viability ban in § 2919.17, and to the viability testing requirement in § 2919.18. If the definition is flawed, then a regulation or requirement based on that definition is also flawed.

III. Whether Issuance of an Injunction Will Save Plaintiff from Irreparable Injury

Having considered the substantial likelihood of Plaintiff's success on the merits, this Court now turns to the remaining prongs governing the issuance of a preliminary injunction. The second prong of the preliminary injunction standard requires the Court to make findings as to whether the issuance of an injunction is necessary to save the plaintiff from irreparable injury.

Importantly, Plaintiff Haskell has standing in this lawsuit not only to raise his own rights, but also to raise the rights of his patients. Therefore, this Court need not decide whether the harm which Plaintiff Haskell will suffer if prosecuted criminally or sued civilly under the Act, is irreparable. Instead, this Court will focus on the harm which will be suffered by his patients.

Both Jane Doe Number One and Jane Doe Number Two testified that they chose to terminate their pregnancies, late in the second trimester, after discovering that their unborn children had severe anomalies. If this Act had been in effect, either or both of these women may have been prevented from terminating their pregnancies, under either the provisions of the viability testing requirement, or the provisions of the post-viability ban. In both cases, the fetus may well have been determined to have been viable, and would not have been able to be aborted.

In this Court's opinion, the cost of being forced by the state to carry to term a child without a spine, or functioning kidneys, or with other such severe defects, is beyond

description. It is difficult to imagine how horrible it would be to knowingly carry a child to term who is dying, or who has no reasonable chance of normal physical development.[43]

In addition, it is impossible to calculate the harm which would be suffered by a pregnant woman who, though she would prefer to try surgery or other methods to mitigate her unborn child's severe defects, is compelled by this ban on post-viability abortions--which only allows an abortion if her physical health is in danger--to terminate her pregnancy before the ban can apply to her, instead of taking measures to help her unborn child, because she feared the emotional and mental cost of carrying a child to term who had such severe defects. It is difficult to imagine a clearer example of irreparable harm, than is evidenced by these two scenarios.

As for the harm suffered by pregnant women who are unable to terminate their pregnancies by means of the D & X procedure, Jane Doe Number Two testified that the procedure was helpful to her because it allowed her fetus to be aborted intact, which was necessary for the performance of an autopsy. After learning that the defect was not genetic, she and her husband had more children. Jane Doe Number One testified that the D & X procedure was much easier to endure than an earlier abortion performed by use of an induction procedure. In addition, this Court has held that Plaintiff has demonstrated a

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[43]Although it may seem that a child who was certain to die, and had no reasonable chance for normal development, would not be considered to be viable, the testimony in this case indicates otherwise. Dr. Harlan Giles, for example, testified that babies with certain chromosomal defects are considered to be viable "even though these children have no reasonable chance for normal mental motor development.... even though it's a very serious defect, [and] even though it usually leads to death in the nursery." (Tr., 11/13, at 286).

substantial likelihood of success of showing that the alternatives to the D & X procedure--induction methods, hysterotomies, and hysterectomies--are neither as safe to the mother's health, nor as available to women seeking non-therapeutic abortions. Pregnant women in this state who are unable to terminate their pregnancies by means of the D & X procedure may therefore suffer irreparable harm, either because other abortion methods are not as safe for their health, or because other abortion methods are not as available to them.

Based on the above, this Court concludes that a preliminary injunction would serve to prevent irreparable injury to the patients of Plaintiff Haskell.

IV. Whether Issuance of an Injunction Would Harm Others

The third prong of the preliminary injunction standard traditionally requires this Court to "balance the equities" in considering whether the harm to the Defendant resulting from issuing the injunction, would outweigh the harm to the Plaintiff resulting from denying the injunction.

As far as the Defendants' interests are concerned, a preliminary injunction will merely maintain the status quo while the constitutionality of this legislation is decided. The potential for irreparable injury to some of Plaintiff's patients has already been discussed; in addition, other pregnant women may be harmed by specific provisions of the Act. For example, the objective reasonableness standard in the medical emergency definition may chill the discretion of a pregnant woman's physician in determining that a medical emergency exists, to the detriment of her health. As another example, the apparent vagueness of the determination of non-viability may chill physicians from determining that certain fetuses are not viable, and, therefore, may place an undue burden in the path of a

woman seeking a pre-viability abortion. In this Court's opinion, therefore, the harm to the patients whom Plaintiff represents, should the preliminary injunction be denied, would be greater than the harm to the Defendants, if the injunction were granted.

V. Whether Issuance of an Injunction Would Serve the Public Interest

The final prong of the preliminary injunction standard requires this Court to determine whether the issuance of an injunction would serve the public interest.

In this Court's opinion, the public interest is best served by a full and fair hearing on the merits of the constitutionality of this legislation, particularly in view of the fact that the Plaintiff has demonstrated a substantial likelihood of success of showing that numerous provisions in House Bill 135 are unconstitutional. Accordingly, the Court concludes that the public interest would be served by the issuance of a preliminary injunction.

VI. Conclusion/Conclusions of Law

To summarize, this Court has held that all four prongs of the preliminary injunction standard weigh in favor of granting a preliminary injunction, which enjoins enforcement of all provisions of House Bill 135. In addition, this Court has held:

(1) it has federal question jurisdiction, under 28 U.S.C. § 1331, over this constitutional challenge to a state statute;

(2) Plaintiff Haskell may seek pre-enforcement review of House Bill 135, and this lawsuit is therefore ripe;

(3) Plaintiff Haskell has standing to bring this action, and may assert both his own rights and the rights of his patients;

(4) the Salerno standard no longer applies to a facial challenge to pre-viability abortion regulations;

(5) the Salerno standard does not apply to a facial challenge to post-viability abortion regulations;

(6) although a state may proscribe most abortions subsequent to viability, the state may not take away a pregnant woman's right to have a post-viability abortion where, in appropriate medical judgment, such an abortion is necessary to preserve her life or health--accordingly, strict scrutiny should not be utilized in this analysis;

(7) Plaintiff has demonstrated a substantial likelihood of success of showing that the definition of "Dilation and Extraction procedure" in O.R.C. § 2919.15(A) is unconstitutional, because of vagueness;

(8) Plaintiff has demonstrated a substantial likelihood of success of showing that the ban on use of the D & X procedure in § 2919.15(B) is unconstitutional, because the state may not ban an abortion procedure unless there are safe and available alternatives, and because this ban may chill the exercise of a woman's right to a pre-viability abortion;

(9) Plaintiff has demonstrated a substantial likelihood of success of showing that the ban on use of the D & X procedure does not serve the stated interest of preventing unnecessary cruelty to the fetus;

(10) Plaintiff has demonstrated a substantial likelihood of success of showing that the mandated determination of

non-viability in § 2919.18(A)(1), as applied to the post-viability ban (§ 2919.17(A)(2)) and the viability testing requirement (§ 2919.18), is unconstitutional, because the objective standard in that determination is inconsistent with the purely subjective standard in the definition of viable in § 2919.16(L);

(11) Plaintiff has demonstrated a substantial likelihood of success of showing that the definition of serious risk of the substantial and irreversible impairment of a major bodily function in § 2919.16(J), as it applies to one allowable exception to the ban on post viability abortions, in § 2919.17(A)(1), is unconstitutional, because its limitation to factors relating solely to physical health impermissibly restricts the physician's determination of whether an abortion is necessary to preserve the health of the pregnant woman;

(12) Plaintiff has demonstrated a substantial likelihood of success of showing that the definition of medical emergency in § 2919.16(F), as it applies to the post-viability ban (§ 2919.17) and the viability testing requirement (§ 2919.18), is unconstitutional, because it lacks a scienter requirement, and thus is vague, and because it does not allow the physician to rely on his or her own best clinical judgment that a medical emergency exists, and so may chill physicians from determining that a medical emergency exists even where necessary to preserve the pregnant woman's life or health;

(13) Plaintiff has demonstrated a substantial likelihood of success of showing that the second physician concurrence requirement in § 2919.17(B)(1)(b) is unconstitutional, because it impermissibly limits the primary physician's discretion, and because it may chill the performance of post-viability abortions that are necessary to preserve the life or health of the mother;

(14) Plaintiff has demonstrated a substantial likelihood of success of showing that the choice of method requirement in § 2919.17(B)(1)(d) is unconstitutional, because it requires the woman to bear an increased medical risk, forces the physician to "trade off" the pregnant woman's health for that of the fetus, and impermissibly interferes with the physician's exercise of discretion, to the detriment of the pregnant woman's health;

(15) Plaintiff has demonstrated a substantial likelihood of success of showing that the second physician attendance requirement in § 2919.17(B)(1)(e) is unconstitutional, because the medical emergency exception appears to be unconstitutional;

(16) Plaintiff has demonstrated a substantial likelihood of success of showing that the rebuttable presumption of viability in § 2919.17(C) is unconstitutional, because the mandated determination of non-viability in House Bill 135 appears to be unconstitutional;

(17) Plaintiff has demonstrated a substantial likelihood of success of showing that the viability testing requirement in § 2919.18(A)(1) is unconstitutional, because the medical emergency definition appears to be unconstitutional, and because the mandated determination of non-viability appears to be unconstitutional.

This Court further concludes that the issuance of an injunction will prevent irreparable injury to the patients of Plaintiff Haskell, that such injury outweighs the injury which will be suffered by Defendants if this injunction is issued, and that the public interest would be served by the issuance of this preliminary injunction.[44]

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[44]This Court adopts the findings set forth within this Opinion as its Findings of Fact, for purposes of Rule 52(a) of the Federal Rules of Civil Procedure. This Court finds support

WHEREFORE, based upon the aforesaid, this Court orders that the Plaintiff's Motion for a Preliminary Injunction be GRANTED, effective as of the filing of this opinion. Accordingly, Defendants, their employees, agents, and servants are preliminarily enjoined from enforcing any provision of

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for its lack of separate findings of fact in the Supreme Court's holding "that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion." Kelley v. Everglades Drainage Dist., 319 U.S. 415, 422, 63 S. Ct. 1141, 1145, 87 L.Ed. 1485 (1943), quoted with approval in B.F. Goodrich Co. v. Rubber Latex Prod., Inc., 400 F.2d 401, 402 (6th Cir.1968); see also Slanco v. United Counties, 711 F.2d 1059 (6th Cir.1983) (allowing district court to adopt oral opinion as findings of fact and conclusions of law for purposes of Rule 52); Craggett v. Bd. of Educ. of Cleveland City Sch. Dist., 338 F.2d 941 (6th Cir.1964) (allowing district court to adopt written memorandum as findings of fact and conclusions of law for purposes of Rule 52).

However, this Court assures Counsel for the Plaintiff and the state Defendants that their detailed, proposed Findings of Fact and Conclusions of Law were thoroughly reviewed and form the basis of much of the discussion contained herein. This includes the submissions of the state Defendants which were not fully delivered to this Court's chambers, by facsimile, until 3:45 a.m., this date. In short, the diligent efforts of Counsel have not been in vain.

For purposes of completing the record, this Court also renders the following evidentiary rulings: Plaintiff's Exhibit 24 is admitted, for the limited purpose of showing the position of the American College of Obstetricians and Gynecologists on the federal Partial Birth Abortion Act of 1995, but not for the truth of the statements asserted therein. Plaintiff's Exhibit 25 is excluded, as hearsay.

House Bill 135. Having considered the issue of bond as is required by Rule 65 of the Federal Rules of Civil Procedure, this Court concludes that no bond should be required of the Plaintiff.

Counsel listed below will note that a brief telephone conference will be held, between Court and Counsel, beginning at 4:00 p.m., Eastern time, on Friday, December 22, 1995, for the express purpose of determining further procedures to be followed in this litigation. Specifically, Counsel should be prepared to discuss whether they wish to proceed to trial upon the merits of the captioned cause, at a date in mid-1996, or whether, in the alternative, Defendants wish to take an immediate appeal of this decision to the Sixth Circuit Court of Appeals, pursuant to 28 U.S.C. § 1292(a)(1).

December 13, 1995

/s/ Walter Herbert Rice
WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

DATE: December 7, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WOMEN'S MEDICAL PROFESSIONAL CORP., et al., *Plaintiffs-Appellees,*	:	
v.	:	Case No. C-3-95-414
GEORGE VOINOVICH, et al., *Defendants-Appellants*	:	JUDGE RICE

ENTRY EXTENDING TEMPORARY RESTRAINING ORDER FOR ADDITIONAL PERIOD OF TIME

For good cause shown (the need to conduct a full and complete oral and evidentiary hearing on the Plaintiffs' Motion for Preliminary Injunction), the Temporary Restraining Order, entered by this Court on Monday, November 13, 1995, is hereby ordered extended through Wednesday, December 13, 1995.

This Order entered nunc pro tunc 12:01 a.m., November 29, 1995.

December 7, 1995 /s/ Walter Herbert Rice
WALTER HERBERT RICE
UNITED STATES DISTRICT
JUDGE

DATE: November 13, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WOMEN'S MEDICAL PROFESSIONAL CORP., et al., *Plaintiffs-Appellees,*	:	
v.	:	Case No. C-3-95-414
GEORGE VOINOVICH, et al., *Defendants-Appellants*	:	JUDGE RICE

DECISION AND ENTRY GRANTING TEMPORARY RESTRAINING ORDER; FURTHER PROCEDURES ORDERED

Based upon the reasoning and citations of authority set forth by this Court, upon the record, in open Court on Monday, November 13, 1995, this Court, sua sponte, grants a Temporary Restraining Order, until such time as this Court has ruled on the merits of the Plaintiffs' request for a preliminary injunction, not to exeed the ten-day period of time for Temporary Restraining Orders set forth by the Federal Rules of Civil Procedure, restraining Defendants and their employees, agents, and servants from enforcing House Bill 135.

This Court will confer with counsel in order to determine further procedure to be followed in this litigation specifically, a hearing date for the conclusion of testimony on the Plaintiffs' Motion for Preliminary Injunction or whether

counsel will agree on a consolidation of the hearing on the Motion for Preliminary Injunction with hearing on the merits of this litigation, pursuant to Fed. R. Civ. P. 65(a)(2), and, if so, a date for the hearing of said consolidated proceeding.

This Court, having considered the issue of bond, as is required by Fed. R. Civ. P. 65, concludes that no bond should be required of the Plaintiffs. Usaco Coal Company v. Carbomin Energy, Inc., 689 F.2d 94 (6th Cir. 1982)

November 13, 1995 /s/ Walter Herbert Rice
WALTER HERBERT RICE
UNITED STATES DISTRICT
JUDGE

No. 97-934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GEORGE VOINOVICH, Governor, State of Ohio; BETTY D. MONTGOMERY, Attorney General, State of Ohio; and MATHIAS H. HECK, JR., Montgomery County Prosecuting Attorney,

Petitioners,

—v.—

WOMEN'S MEDICAL PROFESSIONAL CORPORATION; and MARTIN HASKELL, M.D.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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39 pp

QUESTIONS PRESENTED

1. Whether the court of appeals was correct in holding that Ohio's unique statute banning certain surgical abortions is unconstitutional because it effectively bans the most common method of second-trimester abortion?

2. Whether the court of appeals was correct in holding that Ohio's criminal statute banning abortions after viability is unconstitutional because it lacks both a scienter requirement and an adequate exception for abortions necessary to protect the woman's health?

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Respondents Women's Medical Professional Corporation and Martin Haskell, M.D., on behalf of themselves and the patients they serve, respectfully submit the following brief in opposition to the petition for certiorari filed by George Voinovich, the Governor of Ohio, et al. ["the State"], docketed on December 5, 1997.

OPINIONS BELOW

The opinion of the district court is reported at 911 F. Supp. 1051 (S.D. Ohio 1995). The opinion of the court of appeals is reported at 130 F.3d 187 (6th Cir. 1997).

PRELIMINARY STATEMENT

This case does not involve a "partial birth abortion" law. The Ohio statute does not use that term and defines the banned procedures differently than statutes that ban "partial birth abortion." *See* nn. 2 & 3 *infra*. At issue is a unique criminal statute that uses imprecise terminology to ban the dilation and extraction ("D&X") surgical abortion procedure throughout pregnancy, as well as "attempts" to use the D&X procedure. Although the focus of the ban is on the use of suction in abortion surgery, a first-trimester procedure, suction curettage or aspiration, is explicitly excluded from the ban. The other procedures that involve suction – particularly dilation and evacuation ("D&E"), the most common second-trimester abortion procedure - are swept into the ban.

The statute also bans most post-viability abortions. The post-viability ban lacks any *mens rea* requirement and therefore imposes strict criminal liability on physicians. Further, the post viability ban lacks an adequate exception for maternal health.

The jurisprudence applied by the lower courts to strike down the statute is both correct and well established. The

petitioners fail to present any conflict with the prior abortion decisions of this court or any conflict among the circuits that makes this case appropriate for review. The petition should be denied.

COUNTERSTATEMENT OF THE CASE

I. The Scope and Effect of HB 135

In 1995, the Ohio legislature passed HB 135, a criminal statute banning all abortions performed by the "D&X" procedure throughout pregnancy and prohibiting most post-viability abortions. Pet. Att.[1] The Act also requires fetal viability testing, defines viability and imposes five separate limitations on the few post-viability abortions that remain permissible under the Act.

A. The Method Ban in HB 135.

The Act defines the D&X procedure as "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain...." Pet. Att.1 (Ohio Rev. Code Ann. ("O.R.C.") § 2919.15(A)). It specifically excludes the most common first-trimester methods, suction curettage and suction aspiration. *Id.* Contrary to the State's assertion, *see* Pet. at 15, the D&X definition in the Ohio Act is not synonymous with "partial birth abortion,"[2] nor is the Ohio Act similar to the partial

[1] Citations to the Petition are in the form "Pet."; to its unpaginated Attachment are in the form "Pet. Att."; and to its Appendix are in the form "A-__": citations to the trial record are given as "witness, transcript date, page."

[2] *See, e.g.*, Mich. Comp. Laws Ann. §§ 333.17016, 333.17516 (West Supp. 1997) (Partial-birth abortion means an abortion in which the physician "partially vaginally delivers a living fetus before killing the fetus and completing the delivery.").

birth abortion bans enacted in 16 other states.[3] Pet. at 15-16. Unlike the Ohio Act, the sixteen partial birth abortion bans do not even attempt to exclude from their scope any abortion procedures at all, nor do they include suctioning of the fetal brain as an element. Moreover, all the other statutes involve a ban on a method of terminating a fetal life while the Ohio Act refers to the broader concept of "termination of a human pregnancy," which includes removal of a dead fetus.

[3] Although defendants claim that 17 states, including Ohio, regulate partial birth abortions, see, Pet. at 15-16, only Ohio bans the D&X procedure. The other 16 states ban "partial birth abortion," defined using language nearly identical to that in Michigan. *See* n.2, *supra*, and statutes listed at Pet. 15-16. Eleven of these statutes have been challenged and have either been enjoined or are pending final adjudication. *See Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997) (permanent injunction); *Planned Parenthood of Southern Arizona v. Woods*, No. 97-385-TUC-RMB, 1997 U.S. Dist. LEXIS 17226 (D. Ariz. Oct. 24, 1997) (permanent injunction); *Carhart v. Stenberg*, 972 F. Supp. 507 (D. Neb. 1997) (preliminary injunction); *Causeway Medical Suite v. Foster*, No. 97-2211 (E.D. La. July 14, 1997) (TRO); *Rhode Island Medical Soc'y v. Pine*, No. 97-416L (D.R.I. July 11, 1997) (TRO); *Little Rock Family Planning Services v. Jegley*, No. LR-C-97-581 (E.D. Ark. July 31, 1997) (TRO); *Planned Parenthood of Central New Jersey v. Verniero*, No. 97-6170 (D.N.J. Dec. 24, 1997) (TRO); *Summit Med. Assocs. v. James*, No. 97-T-1149N, 1998 U.S. Dist. LEXIS 737 (M.D. Ala. Jan. 26, 1998) (denying motion to dismiss in relevant part); *Midtown Hospital v. Miller*, No. 1:97-CV-1786-JOF (N.D. Ga. July 23, 1997) (denying TRO while limiting enforcement to post-viability); see *also Intermountain Planned Parenthood v. Montana*, No. BDV 97-477 (Mont. Dist. Ct. Oct. 1, 1997) (preliminary injunction under Montana Constitution); *Planned Parenthood of Alaska v. Alaska*, No. 3AN-97-06019 Civil (Alaska Sup. Ct. 3rd Dist. July 31, 1997) (TRO under Alaska Constitution).

B. The Post-Viability Ban in HB 135.

In addition to the method ban, HB 135 bans almost all post-viability abortions. The Act creates a rebuttable presumption of viability at twenty-four weeks of gestational age, Pet. Att. 5 (O.R.C. § 2919.17(C)), where gestational age is "the age of an unborn human as calculated from the first day of the last menstrual period of a pregnant woman." *Id.* at 2 (O.R.C. § 2919.16(B)). For any abortion performed after twenty-one weeks of pregnancy, the physician must perform a medical examination and tests to determine that the fetus is not viable. *Id.* at 6 (O.R.C. § 2919.18 (A)(1)-(2)).

The post-viability ban contains two exceptions, but both lack a *mens rea* or scienter requirement. *Id.* at 3-4 (O.R.C. § 2919.17(A)). The first exception permits post-viability abortions if a physician "determines in good faith and in the exercise of reasonable medical judgment, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman." *Id.* at 3 (O.R.C. § 2919.17(A)(1)). The second exception permits an abortion where the physician has determined "in good faith and in the exercise of reasonable medical judgment, after making a determination relative to the viability of the unborn human in conformity with [O.R.C. § 2919.18(A)] of the Revised Code [regulating the determination of viability] that the unborn human is not viable." *Id.* at 3-4 (O.R.C. § 2919.17(A)(2)).

The Act requires physicians who do perform post-viability abortions to take five additional steps: a certification requirement; a second physician concurrence requirement; a neonatal facility requirement; a choice-of-method requirement; and a second-physician attendance requirement.

Id. at 4-5 (O.R.C. § 2919.17(B)(1)). A person who violates the ban on post-viability abortions is subject to both criminal liability as well as civil liability for compensatory and punitive damages. *Id.* at 5-8 (O.R.C. §§ 2919.17 (D) & 2307.52(B)).

C. General Description of Abortion Procedures and Relative Risks.

Abortion is a very safe medical procedure and has become increasingly safe since this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973) . One major reason for this is the development of safer abortion techniques.[4] In 1983, this Court acknowledged this development, finding that since *Roe*, "the safety of second-trimester abortion has increased dramatically . . . the principal reason is that the D&E procedure is now widely and successfully used." *City of Akron v. Akron Center for Reproductive Health, Inc.* ["*Akron I*"], 462 U.S. 416, 436-37, 430 n.11 (1983).

The majority of abortions performed in Ohio, and in the United States generally, occur during the first trimester of pregnancy. A-94-95. Those abortions are mainly performed by suction curettage or aspiration. A-21. In this procedure, the cervix is dilated and the products of conception removed by suction with a vacuum aspirator inserted into the uterus. *Id.*

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[4] Deaths from legal abortions declined fivefold between 1973 and 1985 (from 3.3 to 0.4 per 100,000 procedures), making abortion mortality more than 10 times lower than death from childbirth. *See* Council on Scientific Affairs, AMA, *Induced Termination of Pregnancy Before & After Roe v. Wade*, 268 JAMA 3231, 3235 (1992). Evolving abortion methods, particularly the shift from instillation to D&E for second-trimester abortions, are identified by the American Medical Association critical to this increased safety. *Id.* at 3232.

In the second trimester, when the fetus is often too large to be removed solely by suction, the dilation and evacuation ("D&E") procedure is most commonly used. A-22. During the D&E procedure, the physician employs both suction and forceps to accomplish a complete evacuation of the uterus. A-22. The fetal body, which at later stages of pregnancy cannot be removed simply with suction, must be crushed or disjoined. A-22. The head, because of its size, often cannot pass through the woman's cervical opening without some form of decompression. In this conventional D&E as well as in all of the surgical variations of the D&E, suction is used to remove the contents of the skull during the surgery. A-22-23.

Subsequent to the first trimester, other methods to terminate the pregnancy include induction or instillation methods. A-97-98; *see also* A-28 n.12. During these procedures, the physician either injects a substance, such as a prostaglandin and urea combination, into the woman's amniotic cavity, or places prostaglandin suppositories into the vagina. A-97. The substances trigger labor, which results in the eventual birth of a stillborn, often after more than twelve hours of labor.[5] A-97-98.

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5 The various induction methods have all the medical risks and complications of labor, A-104, as well as specific contraindications depending on each woman's medical diagnosis. For example, hypertension, asthma, epilepsy, and glaucoma are all contraindications for saline abortion. Campbell, 12/6 Tr. at 26. Similarly, prostaglandin abortions are contraindicated for women with asthma, epilepsy, glaucoma, and pulmonary hypertension or systemic hypertension. Instillation abortions may be contraindicated for women who have had previous cesarean sections or active pelvic infections, or for women with a fetal death in utero. A-105; Campbell, 12/6 Tr. at 26-28. Complications associated with induction abortion range from forcing fluids or fetal protein into the maternal circulation to hemorrhage and infection A-98, to severe respiratory and cardiac complications. Campbell, 12/6 Tr. at 31.

Rarely used abortion procedures include hysterotomy which is a cesarean section prior to viability, and a hysterectomy which is the surgical removal of the uterus. These are major surgical procedures and pose the most complications of all as they are much more invasive and traumatic than any of the other procedures. A-105.

D. The Method Ban in HB 135 Encompasses the D&E Procedure.

The D&E method is the most common and safest method of abortion during the second trimester. A-95; A-98. When the fetal skull is too large to pass through the cervix, physicians performing D&E abortion procedures use various techniques to reduce it. Some physicians crush the fetal skull with forceps and suction both the contents and skull pieces to remove them from the uterus. Others do not crush the skull but prefer to decompress it by suctioning its contents after the skull has been separated from the rest of the fetus. Another variation is employed by some physicians who compress the skull with suction while it is still attached to the rest of the fetus. *See* A-100-101 n.19. All of these surgical variations are encompassed by the HB 135 ban because they involve "purposely inserting a suction device into the skull of a fetus to remove the brain . . ." or an attempt to do so. A-23-27.

Three goals are pursued as surgeons continue to improve any surgical method. First, they seek to minimize trauma to the patient; second, minimize blood loss; and third, reduce surgical time. Suction helps a surgeon performing an abortion accomplish those goals by reducing the amount of material that must be removed physically by forceps and thereby permitting the evacuation of the uterine cavity more safely and expeditiously. A-96, 100. Suction has long been an important aid in abortion surgery. Prohibiting the use of suction to "remove the fetal brain" ignores the fact that

suction aids in the removal of *every* part of the fetus during abortion surgery, at *every* stage of gestation.

In all conventional second-trimester D&E surgical abortions, suction is employed to "purposely" remove the brain and all fetal parts. Indeed, Dr. Doe Number One testified that he seeks to "purposely" collapse the head by using suction to evacuate its contents in pregnancies as early as 15–18 weeks. A-101 n.19. Thus, Ohio's statute imposes a ban on all suction-assisted abortion techniques after the first trimester and effectively bans the conventional D&E surgical method.

E. The D&X Method Employed by Dr. Haskell Is The Safest, Most Available Technique for Certain Abortions.

One variation of the D&E procedure is referred to as modified D&E, intact D&E or dilatation and extraction ("D&X"). A-22; A-98. Plaintiff respondent Dr. Haskell is one physician who uses this procedure. In this variation, the cervix is dilated and the physician tries to remove the fetus from the uterus intact. A-22-23; A-99-100. Using forceps, the physician performs a breech delivery of the fetus, with the exception of the head, which is too large to deliver. A-23; A-99. Since a major goal is to avoid trauma to the woman's cervix during the procedure, the physician creates a small opening at the base of the fetal skull and evacuates the contents, allowing the head to pass through the cervical opening. A-23; A-99. Drs. John Doe One and John Doe Two also employ surgical abortion techniques similar to the D&X. A-101 n.19.

Although the conventional D&E is the safest abortion technique from the thirteenth to the twentieth week of pregnancy, after the twentieth week, the size of the fetus and the increased difficulty of dismemberment make uterine

injury more likely. A-97-98. The district court found that D&X was preferable to D&E because "it does not require sharp instruments to be inserted into the uterus with the same frequency or extent," A-110, and "because it causes less trauma to the maternal tissues (by avoiding the break up of bones, and the possible laceration caused by their raw edges), less blood loss, and results in an intact fetus that can be studied for genetic reasons." A-107. Further, unlike D&E, the D&X procedure prevents the woman from coming into contact with neurologic fetal tissue, which can interfere with the woman's blood-clotting ability. A-96.

After comparing the risks associated with the available abortion techniques -- including D&E, D&X, induction methods, and hysterotomy and hysterectomy -- the district court correctly determined that after the twentieth week of a woman's pregnancy, the D&X procedure employed by Dr. Haskell is the safest method of abortion. A-105-111. The district court also found that the D&X procedure performed by Dr. Haskell is more available in Ohio than its main alternative, the induction method. A-111-12.

F. The Health Exception to the Post-Viability Abortion Ban is Limited to Physical Health.

HB 135 permits a post-viability abortion if the abortion is "necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman."[6] Pet. Att. 3

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[6] The law defines "serious risk of the substantial and irreversible impairment of a major bodily function" as:

> any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function, including, but not limited to, the following conditions:
>
> (1) Pre-eclampsia;

(O.R.C. § 2919.17). The Court of Appeals and the district court correctly found that this health exception impermissibly restricts physicians to physical health problems and excludes all consideration of mental and emotional health problems that may be manifested by the pregnant woman. A-34; A-137-38. For example, HB 135 would have blocked an abortion sought by an eleven year old victim of incest who was the subject of testimony. That pregnancy was twenty-two weeks along when terminated by Dr. Hillard shortly before the trial of this action. A-136. The Act would also have prohibited the abortions of Jane Doe I and Jane Doe II who very much wanted their pregnancies to continue but who both carried fetuses with severe fetal anomalies. A-132-136.

II. History of the Litigation

A. District Court Opinion

On the basis of six days of hearings, the district court found that both the method and post-viability bans were void for vagueness and violated the right of privacy. A-94, 102, 112-113. The district court found that the D&X abortion method is a variant of the most common second-trimester abortion method, the D&E. A-100. Because the Act's definition of D&X focuses on the use of suction, the ban encompasses both D&E and the D&X variant. The court found that the Act failed to provide fair warning of the prohibited conduct and, therefore, was unconstitutionally vague. A-102.

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(2) Inevitable abortion;

(3) Prematurely ruptured membrane;

(4) Diabetes;

(5) Multiple sclerosis.

Pet. Att. 2-3 (O.R.C. § 2919.16(J)).

In addition, the court made extensive factual findings that the D&X technique, in which the physician attempts to remove the fetus intact, is the safest abortion method for women over twenty weeks pregnant. A-110-113. Prohibiting this method, even if it could be defined as distinct from conventional D&E, would impermissibly compromise the lives and health of women. *Id.* Moreover, the district court found the Act not only failed to promote the state's claimed interest in preventing cruelty to the fetus, A-121, but that the selectiveness with which it served this interest was some indication that the actual purpose was to erect an obstacle to women seeking abortion services. A-118-19 n.29.

The district court held that the ban on post-viability abortions was unconstitutional because it lacked a valid medical emergency or medical necessity exception. The Act unduly limited the physician's discretion to determine the measures necessary to preserve a woman's life and health, including her mental health. A-34; A-137.

The district court also held that the Act's conflicting standards for viability testing were unconstitutionally vague since it the physician's determination of viability might be judged by an objective standard. A-152. The court also found the medical emergency exception unconstitutional because it lacked a clear scienter requirement for its criminal and civil provisions. *Id.*

B. Court of Appeals Opinion

The court of appeals (per Kennedy & Brown, JJ.) agreed with the district court that the Act's ban on the D&X procedure was unconstitutional because it included not only D&X abortions, but also the most common second-trimester method of abortion, conventional D&E. The ban clearly violated the standard set forth in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and the court below further held

that the post-viability application of the ban could not be severed from the previability application and that "[a]ccordingly, the entire ban is unconstitutional." A-32. The court of appeals did not address the district court's findings that the D&X definition was unconstitutionally vague; that the D&X procedure as performed by Dr. Haskell was potentially safer than other available methods; or that the D&X ban failed to serve the State's asserted purpose for the legislation.

The appellate court also affirmed the district court's ruling invalidating the ban on post-viability abortions. A-34. The court held that the medical necessity and medical emergency provisions were unconstitutionally vague because they lacked scienter requirements, *id.*, and failed to include any protection for a "serious non-temporary threat to a pregnant woman's mental health." A-48.

Judge Boggs dissented from the majority's opinion and would have upheld the constitutionality of the statutes.

REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied because the State has failed to establish any of the factors that weigh in favor of a grant of certiorari. First, the decision of the court below is not "in conflict with the decision of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a); nor did the court below decide "an important federal question ~~in a~~ way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Further, no important question of federal law is raised by this case that has not been, but should be settled by the Court. *Id.* Accordingly, the petition should be denied.

I. THE DECISION OF THE COURT OF APPEALS PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. The Invalidation Of Ohio's Surgical Suction Ban By The Court Of Appeals Was Required Under Well-Settled Decisions Of This Court.

1. The Ban on D&X Abortions as Defined in HB 135 is Unconstitutionally Vague.

The Act expansively defines D&X abortion procedures, in relevant part, as "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain . . ." Pet. Att. 1 (O.R.C. §2919.15(A)). The court of appeals carefully reviewed the findings of the district court and held: "We believe the record amply supports the District Court's and our conclusion that the D&E procedure can entail purposely inserting a suctioning device into the skull in order to empty the brain contents." A-26 (footnote omitted). The court also noted that the ban on any "attempt" to perform the D&X procedure further supported this conclusion. A-26 n.10.

The court of appeals did not specifically address the district court's legal conclusion that this method ban was unconstitutionally vague, but the district court conclusion on that point is entirely consistent with this Court's jurisprudence requiring that criminal laws provide "fair warning as to what conduct is permitted, and as to what conduct will expose them to criminal and civil liability." A-102 (footnote omitted). *See Grayned v. City of Rockford*, 408 U.S. 104 (1972). This principle is particularly important when the criminal laws implicate constitutionally protected activity. *See, e.g., Colautti v. Franklin*, 439 U.S. 379, 395 (1979). Finally, as a result of the vagueness of the Act, it has

the additional defect of exposing physicians to arbitrary enforcement and chilling physicians from providing abortions. *See id.*

2. The Ban on D&X Abortions Imposes an Undue Burden on the Right of Women to Choose Previability Abortions.

The holding of the court of appeals that the Act imposes an undue burden on women's access to previability abortions follows directly from this Court's determination that it is unconstitutional to ban a safe, common method of abortion. In *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976), this Court invalidated a ban on saline amniocentesis abortions (a type of induction procedure). At the time *Danforth* was decided, approximately 70% of all post-first-trimester abortions in Missouri were done by saline amniocentesis, 428 U.S. at 76, and the saline procedure was safer with respect to maternal mortality than continuing a pregnancy to term. *Id.* at 77. This Court held that the ban was unconstitutional because it "forces a woman and her physician to terminate her pregnancy by methods [namely hysterotomy or hysterectomy] more dangerous to her health than the method outlawed." *Id.* at 79.

The principles established in *Danforth* apply here. By effectively banning all D&E procedures, including the D&X variation, the Act is "almost tantamount to a prohibition of any abortion" after 12 weeks of pregnancy. *Id.*, 428 U.S. at 102 (Stevens, J., concurring in part and dissenting in part). Between 13 and 16 weeks of pregnancy, the only abortion procedures that physicians perform is the D&E. A-97. After sixteen weeks, induction procedures would theoretically be available despite the Act, but compared to inductions, D&Es are "less painful," A-98, "take [ ] less time," *id.*, and have a "reduced risk of retained products of conception, infection, hemorrhage, and cervical injury." *Id.* Thus, for some

women, the Act operates as a ban on all second-trimester abortions except for hysterotomy and hysterectomy, and for others it operates as a ban on the safest and most available abortion methods. This is plainly unconstitutional under *Danforth*.

The lower courts correctly concluded that *Casey* also requires invalidation of the Ohio Act. "Because the definition of the banned procedure includes the D&E procedure, the most common method of abortion in the second trimester, the Act's prohibition on certain uses of suction in post-first-trimester abortions has the effect 'of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" A-28 (quoting *Casey*, 505 U.S. at 877). In *Casey*, this Court struck down Pennsylvania's spousal notice requirement because it "will often be tantamount to [a] veto" over a woman's abortion decision. 505 U.S. at 897. Here, by banning all abortions between 13 and 16 weeks of pregnancy and dramatically limiting abortions thereafter to those that are less safe and less available, the Act will effectively prevent a significant number of women from obtaining pre-viability second-trimester abortions.

Even if the Act banned only the D&X abortions as performed by Drs. Haskell, John Doe I and John Doe II, the lower court ruling would still be correct under *Casey*, *Danforth* and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).[7] As the

[7] The State originally claimed that the conventional D&E procedure was included in the definition of suction curettage and vacuum aspiration procedures and therefore not banned by HB 135, since the Act explicitly excludes those procedures. This argument was carefully considered and then firmly rejected by the district court which held that suction curettage and vacuum aspiration describe first-trimester abortion procedures and that conventional D&E is clearly a second-trimester procedure. A-94. The State has now abandoned this argument but continues, now without

district court here held: "use of the D&X procedure in the late second trimester appears to pose less of a risk to maternal health" than the D&E procedure, the induction procedure or hysterotomy and hysterectomy. A-110.[8] As a result, the

foundation, to argue to this Court that the Ohio ban is limited to the D&E variation performed by Dr. Haskell and known as intact D&X, even though the text of the Act wholly fails to do so.

[8] The State and Judge Boggs in dissent rely on a statement by the Board of Trustees of the American Medical Association (AMA) for the medical conclusion that the D&X procedure is never the only appropriate abortion procedure. *See* Pet. 17; A-59. This statement is not part of the record in this case and was not even issued until nearly two years after HB 135 was passed. This Court is not in a position to weigh a nonrecord opinion by the AMA against all of the record evidence in this case. *See Russell v. Southard*, 12 How. 139, 159 (1851) ("This court must affirm or reverse upon the case as it appears in the record"). *See also New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970).

The AMA definition of "intact D&X" is markedly different from the definition in HB 135, because the former requires, *inter alia*, that the fetus be *living* after the torso is delivered intact and before the head is compressed. In this case, the State stipulated that at the beginning of the D&X procedure "some fetuses are dead and some are alive." A-118 n.29. Thus the procedure banned by the Ohio law is much broader than that defined by the AMA. Nor is the recent AMA statement consistent with the Statement of Policy on Intact D&X by the American College of Obstetricians and Gynecologists (ACOG). The opinion of the Ohio ACOG Section Chief was presented to the district court and explained at trial by Dr. Goler. *See* 12/16 Tr. at 126-27.

Finally, in its recent published statement, ACOG has taken the position that the intact D&X procedure "may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman, and only the doctor, in consultation with the patient, based upon the woman's particular circumstances can make this decision." Statement on Intact Dilatation and Extraction, ACOG Statement of Policy (Jan. 12, 1997). Even the AMA itself has stated that the intact D&X procedure "may minimize trauma to the woman's uterus, cervix, and other vital organs. Intact D&X may be preferred by some physicians, particularly when the fetus has been diagnosed with hydrocephaly or other anomalies incompatible with life outside the

district court correctly concluded that "[b]ecause the D&X procedure appears to have the potential of being a safer procedure than all other available abortion procedures" used in the later part of the second trimester, "the state is not constitutionally permitted to ban the procedure." *Id.* It further concluded that if "women were forced to use riskier and more deleterious abortion procedures," the ban would unduly burden the abortion right. A-110-11. That holding follows ineluctably from *Casey*, and this Court's prior abortion jurisprudence.

A state cannot force a woman from a safer abortion procedure to a riskier one. In *Thornburgh*, this Court struck down a statute that would have required doctors performing post-viability abortions to use the abortion method most likely to result in a live birth, unless doing so "would present a significantly greater risk to the life or health of the pregnant woman." 476 U.S. at 768. Because the statute required a "trade-off" between the woman's health and fetal survival, and "failed to require that maternal health be the physician's paramount consideration," *id.* at 768-69, it was facially unconstitutional. *Id.* at 769 (citing *Colautti*, 439 U.S. at 397-401). If a woman cannot be required to have an abortion procedure that exposes her to any additional health risk for the fetus after viability, she surely cannot be forced to do so prior to viability.

This conclusion regarding the more limited ban on a narrowly interpreted HB 135 is also supported by *Danforth*. There the court examined several factors in concluding that Missouri could not ban the use of saline amniocentesis as a method of abortion. First, the Court looked at whether saline amniocentesis was "an accepted medical procedure in this

womb." *See Carhart*, 972 F. Supp. at 515 (quoting AMA statement as a finding of fact).

country." *Id.*, 428 U.S. at 77. Ohio's method ban, even if it does not cover D&E's generally, prohibits an accepted medical procedure. Second, *Danforth* relied on the "anomaly" that the Missouri law banned saline abortions "but [did] not prohibit techniques that are many times more likely to result in maternal death." 428 U.S. at 78. Similarly, the Ohio method ban does not prohibit abortions by hysterotomy or hysterectomy, both of which procedures "are many times more likely to result in maternal death" than D&X abortions. Finally, the Court observed that saline abortions were "safer, with respect to maternal mortality, than even continuation of the pregnancy until normal childbirth." *Id.* Here, too, the D&X ban is safer than continuation of pregnancy through childbirth. Thus, under *Danforth*, even a narrower D&X ban, as suggested by the State, is invalid.

3. The Ban on D&X Abortions Unconstitutionally Increases the Health Risks of Post-Viability Abortions.

To the extent that the method ban extends to abortions after viability, the lower court's decision is squarely supported by *Thornburgh* and *Casey*, and thus raises no issues appropriate for review by this Court. It is well-established that after viability, a woman has the right to obtain an abortion "where it is necessary, in appropriate medical judgment, for the preservation of [her] life or health . . ." *Casey*, 505 U.S. at 879 (citing *Roe*, 410 U.S. at 164-165), and that she is entitled to select the abortion method that is safest for her health. *Thornburgh*, 476 U.S. at 768-69; *Jane L. v. Bangerter*, 61 F.3d 1493, 1502-05 (10th Cir. 1995), *rev'd on other grounds sub nom. Leavitt v. Jane L.*, 518 U.S. 137 (1996). Thus, even if the Act reached only the D&X procedures as claimed by the State, the ban is unconstitutional because the D&X procedure is safer after

viability than other types of post-viability abortion procedures. A-110.

B. The Unconstitutionality Of Ohio's Post-Viability Abortion Ban Is Well-Settled.

1. The Lack of a Scienter Requirement Renders the Post-Viability Ban Vague.

The court of appeals properly struck down the ban on post-viability abortions, holding that "the medical necessity and medical emergency provisions are unconstitutionally vague because they lack scienter requirements." A-34. This ruling is consistent with well-established caselaw.

HB 135 permits the physician to proceed with a post-viability abortion upon a determination of "medical emergency" made "in good faith and in the exercise of reasonable medical judgment." *See* Pet. Att. 2 (O.R.C. §2919.16(F)). Likewise, application of the "medical necessity" exception requires a physician determination made "in good faith and in the exercise of reasonable medical judgment." *Id.* at 3 (O.R.C. §2919.17(A)(1)). The court described the defect as follows:

> Thus, both of these provisions contain subjective and objective elements in that a physician must believe that the abortion is necessary and his belief must be objectively reasonable to other physicians. This dual standard as written contains no scienter requirement. Therefore, a physician may act in good faith and yet still be held criminally and civilly liable if, after the fact, other physicians determine that the physician's medical judgment was not reasonable.

A-35. In concluding that the absence of a scienter requirement made these provisions unconstitutionally vague, the court of appeals properly relied on three cases. First, in *Colautti*, this Court held a Pennsylvania law unconstitutionally vague which required each physician who performs an abortion to determine viability "based on his experience, judgment, or professional competence." *Id.*, 439 U.S. at 380 n.1 (quoting Pennsylvania statute). Additional requirements were imposed by the statute "if there [was] sufficient reason to believe that the fetus [might] be viable." *Id.* This language lacked a scienter requirement and therefore served as "little more than 'a trap for those who act in good faith.'" *Id.* at 395 (citations omitted). Similarly, the court below correctly concluded that the language of HB 135 will have a profound "chilling effect" on physicians who "cannot know the standard under which their conduct will ultimately be judged." A-38.

The only other court of appeals decisions addressing this issue in the abortion context have been decided by the Eighth Circuit and support the decision of the court of appeals in this case. *See Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 534 (8th Cir. 1994) (presence of scienter requirement saved North Dakota medical emergency definition); *Planned Parenthood v. Miller*, 63 F.3d 1452, 1465 (8th Cir. 1995) (absence of scienter requirement made criminal provisions of South Dakota parental notice and waiting period unconstitutional), *cert. denied*, 116 S. Ct. 1582 (1996).

The State practically concedes the vagueness of the Act in the petition when it laments the failure of the courts to accept "reasonableness" as a basis for criminal liability in the area of abortion regulation. By conceding that "clear lines are hard to find," Pet. 26, the State itself has underscored the need for a scienter requirement. The court of appeals thus

correctly held that the post-viability ban in HB 135 is unconstitutionally vague.

2. The Lack of an Adequate Health Exception Violates the Right to Privacy.

Ohio's post-viability abortion ban, which limits its health exception to physical health, runs afoul of twenty-five years of this Court's jurisprudence consistently holding that a ban on abortions after viability must contain exceptions for abortions necessary to preserve the woman's life and health. *Roe*, 410 U.S. at 165 (State may proscribe abortion after viability "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother"); *Colautti*, 439 U.S. at 400; *Casey*, 505 U.S. at 879 (reaffirming *Roe's* requirement that post-viability abortion ban contain exception for woman's life and health); *Thornburgh*, 476 U.S. at 768-69 (woman's health must be physician's "paramount consideration" even after viability). *See also Jane L. v. Bangerter*, 102 F.3d 1112, 1118 n.7 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 2453 (1997).

That "health" under *Roe's* required exception to post-viability abortion bans includes mental health is not in doubt. *Roe* itself states that whether the woman's health would be preserved by an abortion must be left to "appropriate medical judgment." 410 U.S. at 165. Certainly such medical judgment must take into account both physical and mental health. Moreover, as this Court wrote before it decided *Roe*, "whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." *United States v. Vuitch*, 402 U.S. 62, 72 (1971) (footnote omitted).

It strains credulity to suppose that when this Court used the word "health" in requiring exceptions to post-viability

bans in *Roe* two years later, and re-affirmed that language in *Casey*, the Court intended physicians to use "appropriate judgment" different from that used "whenever surgery is considered." *See Doe v. Bolton*, 410 U.S. 179, 191-92 (1973) (statute at issue in *Vuitch*, having been construed to "bear upon psychological as well as physical well-being," allowed physicians to exercise judgment they would be "called upon to make routinely"). Thus, the holding of the court of appeals that Ohio's post-viability ban is invalid because it lacks a mental health exception, *see* A-45-49, is entirely consistent with settled law.

II. THE STANDARD OF REVIEW APPLIED BY THE COURT OF APPEALS IS IN ACCORD WITH THE DECISIONS OF THE OTHER UNITED STATES COURTS OF APPEALS AND OF THIS COURT.

A. The Standard Of Review Employed By the Court Of Appeals To Determine That Ohio's Abortion Method Ban Violates The Right To Privacy Is Consistent With The Decisions Of This Court And Of The Majority Of Courts Of Appeals.

The standard of review used by the court of appeals to assess the facial constitutionality of Ohio's method ban is the standard used by the controlling opinion of this Court in reviewing the Pennsylvania abortion restrictions in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Casey* holds that a pre-viability abortion restriction is unconstitutional on its face if "in a large fraction of the of the cases in which [the restriction] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." 505 U.S. at 895 (joint opinion). The court below properly used this standard in affirming the district court's judgment that the method ban is invalid, reasoning as follows:

> [I]t follows that a statute which bans a common abortion procedure would constitute an undue burden. An abortion regulation that inhibits the vast majority of second-trimester abortions would clearly have the effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion.

A-28. Thus, there is no conflict between the decision of the court below and the most recent (and hence controlling) relevant decision of this Court.

In order to find a conflict that calls for resolution, the State therefore urges this Court to look to older decisions of this Court seemingly applying a different standard and to two decisions of a single court of appeals. But its efforts are unavailing. The proposed alternative standard of review, dubbed the *Salerno* standard because it derives from this Court's opinion in *United States v. Salerno*, 481 U.S. 739, 745 (1987), "has been properly ignored in subsequent cases even outside the abortion context." *Janklow v. Planned Parenthood*, 116 S. Ct. 1582, 1583 (1996) (Stevens, J., respecting denial of certiorari) (footnote omitted). Under the *Salerno* dictum, a facial challenge fails unless the challenger shows that there "is 'no set of circumstances' in which the statute could be validly applied." *Id.* This "unfortunate language," *id.*, has never been used by this Court to uphold an abortion restriction that is invalid in a large fraction of its applications.

The abortion cases cited by the State that quote *Salerno's* dictum, *see* Pet. at 10, do not "apply" this standard. First, because the restriction at issue in *Rust v. Sullivan*, 500 U.S. 173 (1991), involved federally funded programs, and because this Court has long held that no right is impinged upon by abortion restrictions in federal funding programs, *see Harris v. McRae*, 448 U.S. 297 (1980), *Rust* actually holds that no

right is violated by the Title X regulations at issue there, not that the regulation is valid even though it violates the Constitution in a large fraction of cases. *See id.*, 500 U.S. at 201-02 (government has no constitutional duty to subsidize abortion counseling or referral). Similarly, although this Court's opinion in *Ohio v. Akron Center for Reproductive Health* [*Akron II*], 497 U.S. 502 (1990), quotes *Salerno*, it does not apply it. Instead, *Akron II* holds the inverse of *Salerno*: that a statute will not be held unconstitutional because it might, in an unlikely or "worst case scenario," violate the Constitution. *See id.* at 514 ("The Court of Appeals should not have invalidated the Ohio statute based upon a worst-case analysis that may never occur."). Similarly, Justice O'Connor in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), wrote that "there may be conceivable applications of [Missouri's] ban on the use of public facilities that would be unconstitutional," *id.* at 523 (O'Connor, J., concurring in part and concurring in the judgment), but found the presence of such "conceivable applications" insufficient to render the statute invalid on its face. *See also Washington v. Glucksberg*, 117 S. Ct. 2302, 2304-05 & n.6 (1997) (Stevens, J., concurring in the judgments). Thus, there is no conflict between the decision of the court below and any of the abortion decisions of this Court cited by the State.

There is likewise no real conflict between the decision of the court below and the decisions of the one court of appeals that even nominally continues to adhere to the *Salerno* dictum. Neither *Barnes v. Moore*, 970 F.2d 12 (5th Cir.), *cert. denied*, 506 U.S. 1021 (1992), nor *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096 (5th Cir.), *cert. denied*, 118 S. Ct. 357 (1997), present a real conflict with the decision of the court below.

First, the *Causeway* decision holds a Louisiana abortion statute unconstitutional under the *Salerno* regime; *a fortiori*, the same statute would be unconstitutional under the more protective standard employed by the court below. Simply put, *Causeway* did not apply *Salerno* "to deny relief in a case in which a facial challenge would otherwise be successful." *Janklow*, 116. S. Ct. at 1583 (Stevens, J., respecting denial of certiorari) (footnote omitted).

Second, as Justice Stevens has noted, "[i]n all likelihood, the decision of the Fifth Circuit [in *Barnes*] applying the 'no circumstance' test would have been decided the same way even if that court had utilized the 'large fraction' test . . . " *Janklow*, 116. S. Ct. at 1583 n.2 (Stevens, J., respecting denial of certiorari). Thus, as to both *Barnes* and *Causeway*, the purported conflict is not sufficiently direct and real to merit resolution by this Court.[9]

In any event, under the State's analysis, *Salerno's* "no set of circumstances" standard is met here. Because the same result would be reached in this case regardless of what standard is applied, there is no reason for this Court to review the lower court decision. The State asserts that "[t]he traditional Salerno requirement has long been met when a statute 'operates on a fundamentally mistaken premise.'" Pet. at 21 (quoting *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 966 (1984)). In *Casey*, the State

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9 Indeed, once the suggested conflict with the Fifth Circuit is laid aside, the decision of the court below to apply the standard used by the joint opinion in Casey is in complete harmony with all other federal courts to consider the question. *Jane L.*, 102 F.3d at 1116; *Miller*, 63 F.3d at 1456-58; *Casey v. Planned Parenthood*, 14 F.3d 848, 861 (3d Cir. 1994); *Compassion in Dying v. Washington*, 79 F.3d 790, 798 n.9 (9th Cir. 1996) (en banc), *rev'd on other grounds sub nom. Washington v. Glucksberg*, 117 S. Ct. 2258 (1997); *see also Karlin v. Foust*, 975 F. Supp. 1177, 1204 (W.D. Wis. 1997).

argues, the spousal notice provision was unconstitutional because it rested on the "mistaken premise" that "'a husband's interest in the potential life of the [unborn] child outweighs a wife's interest [to choose to have an abortion].'" Pet. 21. The same principle applies here. The ban on D&X abortions throughout pregnancy is unconstitutional under the *Salerno* dictum because it rests on the "mistaken premise" that prior to viability any state interest in the potential life of the fetus justifies forcing a woman into having a less safe abortion, or preventing her from making her own decision as to what procedure is best for her. This plainly is not the case.

B. The Standard Of Review Employed By The Court Of Appeals To Determine That Ohio's Post-Viability Ban Is Vague Is Consistent With The Decisions Of This Court And Of The Other Courts Of Appeals.

The State also contends that the vagueness standard applied by the court below conflicts with the standard applied by this Court and several courts of appeals. Contrary to the State's argument, however, the decision of the court below is entirely consistent with this Court's precedents; and whatever conflicts may exist between the standard applied by the court below and the standard applied by other courts of appeals is not a direct and real conflict, but one that evaporates upon careful examination of the cases cited by the State.

The State's claim that the vagueness standard used by the court of appeals conflicts with this Court's decision in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), is simply incorrect. In *Hoffman*, this Court was careful to qualify its statement that a facial vagueness challenge should be upheld "only if the enactment is impermissibly vague in all of its applications" with the phrase "assuming the enactment implicates no constitutionally protected conduct." *Id.* at 494-95. Similarly,

the Court's subsequent opinion in *Kolender v. Lawson*, 461 U.S. 352 (1983) rejects a requirement that a statute must be "vague in all of its possible applications," *id.*, 461 U.S. at 358 n.8 (quoting Justice White's dissent), in order to be held vague on its face. Instead, the *Kolender* Court recognizes that the Court has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines," holding that when a statute imposes criminal penalties and affects constitutionally protected conduct, the *Hoffman* vagueness test does not necessarily apply. *Id.* The Court also cited *Colautti* with approval, which invalidated an abortion statute on vagueness grounds. *Kolender*, 461 U.S. at 358 n.8. *See also Akron I*, 462 U.S. at 451-52 (invalidating requirement that fetal remains be disposed of "humane[ly]" as impermissibly vague). The State is simply mistaken that the vagueness standard used by the court below conflicts with *Hoffman*, as further elucidated in *Kolender*.

Because none of the other cases cited by the State involve a facial vagueness challenge to a statute affecting constitutionally protected conduct, the State has presented no conflict at all between the vagueness standard applied by the

court of appeals and the standard used by this Court[10] and other courts of appeals.[11]

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[10] First, *Chapman v. United States*, 500 U.S. 453 (1991), in which the Court affirmed a criminal conviction for distributing more than one gram of the prohibited drug LSD, was simply not a facial challenge to a statute, and thus has no bearing on the standard applicable in such a challenge. Further, *Chapman* obviously did not involve constitutionally protected conduct. Second, *Maynard v. Cartwright*, 486 U.S. 356 (1988), which affirmed a grant of habeas corpus to a man sentenced to death in Oklahoma, was decided "under the Eighth Amendment," *id.*, at 361, and involved analysis of whether a particular "aggravating circumstance" was sufficiently clear to "inform juries what they must find to impose the death penalty." *Id.* at 361-62. The Court explicitly distinguished general Due Process Clause vagueness law, which looks to whether a statute gives adequate notice of prohibited conduct. *Id.* at 361. Because *Maynard* was decided under a different analysis, it too does not alter *Hoffman* or *Kolender*.

Nor is there any conflict between the two pre-*Hoffman/Kolender* cases cited by the State, *United States v. Powell*, 423 U.S. 87 (1975), and *United States v. Mazurie*, 419 U.S. 544 (1975), both of which involved appeals from criminal convictions in federal court, and hence were not facial vagueness challenges at all. Nor did either case involve constitutionally protected conduct. Powell was convicted of sending a sawed-off shotgun through the mails, 423 U.S. at 89; and the defendants in *Mazurie* were convicted of introducing liquor into an Indian reservation. 419 U.S. at 545.

[11] None of the court of appeals cases cited by the State involve constitutionally protected conduct. *See United States v. Reed*, 114 F.3d 1067, 1068 (10th Cir. 1997) (appeal from conviction of possession of a weapon or ammunition while unlawfully using marijuana); *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.2d 681, 684 (2d Cir. 1996) (plaintiffs "concede that the local law does not infringe upon a fundamental constitutional right"); *United States v. A Single Family Residence*, 803 F.2d 625 (11th Cir. 1986) (civil forfeiture for drug transaction); *Stoianoff v. Montana*, 695 F.2d 1214 (9th Cir. 1983) (challenge to statute restricting drug paraphernalia). The Eleventh Circuit decision actually confirms *Hoffman* and *Kolender*. *See* 803 F.2d at 630.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: February 3, 1998.

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No. 97-934

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

GEORGE VOINOVICH, et al.,

Petitioners,

v.

WOMEN'S MEDICAL PROFESSIONAL CORP., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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After two rounds of briefing, the petition seems to meet the traditional criteria for granting review. Respondents fail to show that the six-year debate over the proper standard for assessing constitutional challenges to abortion regulations, both within the Court and among the lower courts, has dissipated or will go away any time soon. They fail in any meaningful way to counter the importance of the questions presented. And, in light of the 16-State *amicus curiae* brief filed by Arizona, they cannot demonstrate that the importance of the dispute over Ohio's partial-birth and post-viability abortion regulations is confined to one State alone.

1. Respondents do not identify a single procedural obstacle to reviewing the questions presented. Whether it be the proper standard for assessing these challenges, the validity of Ohio's partial-birth law, or the constitutionality of the State's post-viability regulations, no procedural impediment of any kind stands in the way of considering each issue.

2. Respondents suggest (Br. 22-26) that the Sixth Circuit's standard for assessing facial challenges to abortion laws does not conflict with decisions of this Court. To sustain the point, however, they must do more than counter the petition. They must attack the Sixth Circuit itself -- which (in every other respect), they urge, correctly resolves the questions presented. The lower court acknowledged (A-12) the marked disagreement over the appropriate standard, then was compelled to side with one school of thought over the other. "Although *Casey* does not expressly purport to overrule *Salerno*," the lower court held (*id.*), "in effect it does." The holding that a line of Supreme Court authority has been implicitly overruled warrants review.

Apparently recognizing this problem, respondents suggest (Br. 22-24, 26) that the *Salerno* principle is mere dictum and has not been followed by the Court in other decisions. Not true. Again, the Sixth Circuit makes the point best (A-11), observing that other abortion decisions follow *Salerno*, including *Rust v. Sullivan*, 500 U.S. 173 (1991), *Ohio*

v. Akron Center for Reproductive Health, 497 U.S. 502 (1990), and *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (O'Connor, J., concurring in part and concurring in the judgment). Nor, contrary to respondents' suggestions, do these decisions stand alone. Early as well as modern cases embrace the rule, which ultimately dignifies the presumption that given a choice between applying a law in a constitutional or an unconstitutional manner the States will choose the permissible approach. *See, e.g., New York State Club Assn. v. New York City*, 487 U.S. 1, 11 (1988); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-505 (1985); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 797-98 (1984); *Yazoo and Mississippi Valley Railroad Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219-20 (1912); *Hatch v. Reardon*, 204 U.S. 152, 160 (1907).

Conspicuously missing from the opposition brief is any response to the exchange of views among Justices of the Court over this point during the last six years. *See* Pet. 11; A-14, 15. A division of authority within the Court itself over the proper "line of decisions" to govern a case, *Agostini v. Felton*, 138 L.Ed 2d 391, 423 (1997), ought to be as strong an indicator as there is that a question warrants attention.

3. Respondents next err in suggesting that the lower courts are of one mind on this issue. They claim (Br. 24) that there is "no real conflict" between the decision below and "the decisions of the one court of appeals [the Fifth Circuit] that even nominally continues to adhere" to the *Salerno* principle. Yet again, the Sixth Circuit's decision goes the other way, explicitly acknowledging the conflict. *See* A-12, 14. Respondents also falsely describe the issue. As the petition points out (Pet. 12), the Fourth Circuit also has looked at the question. Yet respondents nowhere respond to that court's statements that "the reasoning of the Fifth Circuit [regarding this lower-court conflict of authority] appears to be most persuasive." *Manning v. Hunt*, 119 F.3d 254, 268-69, n.4 (4th Cir. 1997). That

circuit's views deserve at least as much weight as *Casey v. Planned Parenthood*, 14 F.3d 848, 861 (3d Cir. 1994), on which respondents rely (Br. 25 n.9) to assert that the Sixth Circuit "is in complete harmony with all other federal courts to consider the question."

Neither is it plausible to suggest that the Fifth Circuit's position will change or that it only "nominally" follows this approach. Not just once, but twice, the court has explicitly said that *Casey* did not overrule *Salerno* in the abortion context. *See* Pet. 11-12. And the more recent of those decisions, just last year, *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096 (5th Cir.), *cert. denied*, 118 S. Ct. 357 (1997), came on the heels of suggestions that this lower-court conflict of authority would disappear over time. *See Janklow v. Planned Parenthood*, 116 S. Ct. 1582, 1583 (1996) (Stevens, J., respecting denial of certiorari). It has not. *See also Okpalobi v. Foster*, 981 F.Supp. 977 (E.D. La. 1998).

In a similar vein, respondents suggest (Br. 25) that the 1992 and 1997 Fifth Circuit decisions might "have been decided the same way even if that court had utilized the 'large fraction' test." (Quotation omitted). That, too, does not help them -- first, because it is speculative; second, because it points to still another reason for granting review. As things now stand, a litigant in respondents' position may always suggest that a case may have come out the same way under the "no set of circumstances" or "large fraction" view. That is because the meaning of the latter test remains unclear. As applied by the Sixth Circuit, in fact, the standard potentially goes further than overbreadth itself. The court says (A-12 (quotation omitted)) that a facial attack should succeed if "in a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." Even in the context of free speech challenges, the Court does not measure the "fraction" of invalid applications by

eliminating from consideration all situations where it may validly be applied: The "overbreadth of a statute" must be "judged in relation to the statute's *plainly legitimate sweep*." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (emphasis added); *see Osborne v. Ohio*, 495 U.S. 103, 112-13 (1990); *New York v. Ferber*, 458 U.S. 747, 770 (1982).

Respondents do not dispute the contention (Pet. 21) that *Casey* and *Salerno* may be reconciled because the *Casey* provision rested "on a fundamentally mistaken premise." *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 966 (1984). They instead embrace this position, but mistakenly argue (Br. 25-26) that just such a "premise" infects Ohio's regulation of partial-birth abortions. Consider that argument, however, in the context of an application of the Ohio partial-birth law to a fetus that (all agree) is viable and to a mother that (all agree) would not be impaired physically or mentally by delivering the child. The only "premise" that would prohibit the 19 States that have such bans from enforcing them is the view that government may not prevent a woman "from making her own decision" in this setting. Resp. Br. 26. Yet not just *Casey*, but *Roe* as well, would permit a State to allow the child to be born. Ohio, however, no longer may do so in light of the lower court decision.

4. Respondents defend (Br. 26-28) the lower court's extension of overbreadth review to vagueness claims, arguing that it does not establish a conflict and that overbreadth applies in this setting whenever any "constitutionally protected" actions -- not just free speech claims, in other words, but any constitutional claims -- are implicated. They are wrong on both fronts. Once again, the best conflict response comes from the decision below. In some instances, the Sixth Circuit held, "the Court has suggested that a statute that does not run the risk of chilling constitutional freedoms is void on its face only if it is impermissibly vague in all its applications," as under *Salerno* or

under *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); but in other cases, the Court "has suggested that a criminal statute may be facially invalid even if it has some conceivable application." A-19 (quoting *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 251-52 (6th Cir. 1994)). The issue begs review.

The suggestion that overbreadth applies whenever the litigant's conduct implicates another constitutional claim also represents a striking expansion. It enlarges a dispute about whether overbreadth applies to a class of substantive due process claims into one about whether overbreadth governs most vagueness claims as well. Whether true or not, such a proposition dramatically expands (rather than contracts) the reasons for granting the writ. Not only would this extend overbreadth review to a new area, but at this stage the theory has only the slender support of a series of free speech cases that loosely refer to "constitutionally protected" conduct. *See Kolender v. Lawson*, 461 U.S. 352 (1983); compare *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 168 (1972) (overbreadth "doctrine has not been applied to constitutional litigation in areas other than those relating to the First Amendment"). Acceptance of this argument also would allow courts to impose a pre-viability standard of review on post-viability claims. Yet "[n]o court," as the Sixth Circuit acknowledged, "has considered whether *Casey* displaces *Salerno* in cases involving facial challenges to post-viability abortion regulations." A-16. *Casey*'s explicit recognition of the State's strong interest in protecting life after viability is not compatible with overbreadth review in this setting.

5. The opposition brief fails to show why the issues presented do not raise important federal questions. The most respondents have done (Br. 2-3) is to suggest that Ohio's partial-birth regulation differs from the laws of the 16 other States (now 18, *see* 1997 Ill. Legis. Serv. P.A. 90-560

(West), 1997 N.J. Sess. Law Serv. Ch. 262 (West)) that regulate this procedure. Unlike Ohio's provision, they say (Br. 3), the other "partial birth abortion bans do not even attempt to exclude from their scope any abortion procedures at all." Surely that overstates the matter. Even the legislative definitions of a partial-birth abortion that differ from Ohio's limit "abortion procedures." Illinois, to use one example, prohibits "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery." 1997 Ill. Legis. Serv. P.A. 90-560, section 5. That description plainly covers an abortion procedure, clearly parallels the description of the procedure that respondent Dr. Haskell initiated, and certainly overlaps with Ohio's attempt to regulate this very type of abortion.

In addition to sharing the same goal as Ohio in enacting these partial-birth laws -- curbing the procedure that Ohioan Dr. Haskell developed -- the vast majority of States with such laws joined the 16-State *amicus* brief filed by Arizona calling for review. All told, 13 of the 19 States with partial-birth regulations support review. One reason for their support is respondents' extensive argument (Br. 15-19) that partial-birth statutes generally impose an undue burden, a contention that covers every partial-birth law in existence. Notably, respondents do not dispute the contention (Pet. 16) that Ohio's other post-viability regulations mirror those in many other States.

6. Respondents start their merits defense of the Sixth Circuit's partial-birth analysis by distancing themselves from it. They initially argue (Br. 13-14) that the *district court* was correct in finding the law impermissibly vague because it covers D&E abortions; they then contend (Br. 14-15) that the Sixth Circuit correctly found it to be an undue burden for like

reasons. But the statute simply does not ban the D&E procedure, first and foremost because a D&E does not terminate a pregnancy by purposely inserting the suction device into the fetal skull to evacuate its contents. Any suctioning of fetal brain tissue in a D&E is incidental to the removal of the dismembered fetus from the uterus, making it "neither purposeful nor the means of terminating the pregnancy." A-61-62 (Boggs, J., dissenting). The record evidence makes clear, moreover, that doctors who perform abortions have no difficulty discerning the conduct prohibited by the statute. *See id; cf.* Dr. Doe 1, 12/5 TR at 84 (acknowledging that he did not perform a D&X); *id.* at 65 (stating that in the D&E procedure, insertion of the suction device into the skull was by "serendipity"); Dr. Goler, 12/6 TR at 128 (in D&X, insertion of suction device into skull is purposeful; in the D&E, it is by "happenstance"). (Petitioners of course have not "abandoned" (Opp. Br. 15 n.7) the argument that the statute's exclusion for suction curettage covers the D&E procedure. That is simply one more indicator, though far from the only one, that Ohio has not banned this conventional procedure.)

Nor, as respondents further contend (Br. 15-18), does the statute impose an undue burden simply by regulating the D&X procedure itself, whether in the setting of a pre-viability or a post-viability abortion. Respondents' repeated concern about the effect of this law on the health of the mother neglects to account for the law's exemption, which applies whenever other abortion procedures pose a greater risk to the mother's health. See R.C. 2919.15. Add to this the fact that the partial-birth procedure is not commonly used and is not generally available, and it becomes clear that the regulation of partial-birth abortions by no means constitutes an undue burden.

Respondents err in turning to *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), to bolster this contention. It struck a ban on saline injection abortions because the undisputed evidence showed that it was the most commonly used method of abortion and that the proffered alternative was not available to women in Missouri. *Id.* at 75-79. By contrast, respondents ask the courts to constitutionalize a unique, rarely-used, and recently-developed procedure.

Respondents' construction of a hypothetical class of women affected by the D&X statute – those women who desire to have D&X abortions and for whom the D&X would be the safest available abortion procedure – has no basis in fact or in the record. The lower courts never found that other alternative abortion procedures are unsafe or unavailable. *See* A-110-12; *cf.* A-56 (Boggs, J., dissenting). Nor could they have made such findings in light of the conclusion of the American Medical Association that it "is never the only appropriate procedure and has no history in peer reviewed medical literature or in accepted medical practice development," A-59 (Boggs, J., dissenting) (quoting AMA Board of Trustees Statement of May 19, 1997), and in light of the record evidence, *see* Dr. Giles, 11/13 TR at 277; 12/8 TR at 17-24. Of course, even if one were to assume, contrary to this statement and this evidence, that there are women for whom the D&X would be the only appropriate abortion procedure, the generous exception for cases in which other abortion procedures pose greater risk to the woman's health would permit a D&X abortion to be performed.

7. In defending the court of appeals' conclusion that the medical-necessity exception lacks a scienter requirement and therefore is impermissibly vague (Br. 19-21), respondents offer no response to the contention that the statute *does* contain such a requirement. Only "purposely" committed violations, the law

clarifies, offend the statute. R.C. 2919.17. Nor does *Colautti v. Franklin*, 439 U.S. 379 (1979), help respondents. It of course does not overrule the many cases that permit reasonableness to supply the standard of care in a criminal statute. *See, e.g., Cameron v. Johnson*, 390 U.S. 611, 616 (1968). And it specifically reserves the question whether "under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability." 439 U.S. at 396. In the final analysis, respondents and the court of appeals make the same mistake: Just because a scienter requirement may supply a *sufficient* response to a vagueness challenge *see Screws v. United States*, 325 U.S. 91, 101 (1945), does not make scienter a *necessary* element of all criminal statutes.

8. Respondents offer nothing new in arguing that substantive due process requires a mental health exception to post-viability abortions. Most notably, they fail even to acknowledge, let alone respond to, the argument (Pet. 26-27) that the Ohio health exception parallels the one upheld in *Casey*. Even the Sixth Circuit admitted the tension between its view and *Casey*'s, acknowledging that "*Casey* does suggest that the Act's definition . . . is constitutional" because it parallels the Pennsylvania regulation upheld in *Casey*. A-42. *See also* A-47, 48. Finally, it is often assumed that terminating a pregnancy is synonymous with abortion. But doctors agree that, post-viability, that is not necessarily the case. The uncontradicted evidence shows that at 23 weeks' gestational age (i.e., at or near viability), no maternal conditions that mandate ending a pregnancy also mandate that fetal life be terminated. 11/13 Tr. at 240-42; *cf.* 12/6 Tr. At 48.

CONCLUSION

For these reasons and those elaborated in the petition, we respectfully urge the Court to grant the writ.

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No. 97-934

In The

Supreme Court of the United States

October Term, 1997

GEORGE VOINOVICH, et al.,

Petitioners,

v.

WOMEN'S MEDICAL PROFESSIONAL CORP., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF A MAJORITY OF MEMBERS OF THE OHIO GENERAL ASSEMBLY IN SUPPORT OF PETITIONERS

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January 30, 1998

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INTEREST OF THE *AMICI*[1]

Amici curiae are a majority of the Members of the Ohio General Assembly who strongly support the public policy of the State of Ohio to restrict the use of the dilation and extraction ("D & X") abortion procedure and to prohibit most post-viability abortions. The bill enacting these provisions (Sub. H.B. 135) passed by overwhelming margins in the Ohio Senate (29-4) and House of Representatives (82-15).

Ohio's petition presents two substantive questions regarding abortion law: First, whether the States may restrict the use of a cruel and unusual abortion technique, a technique that borders on infanticide; and, second, whether the States may limit post-viability abortions to serious physical health reasons. The court of appeals held that Ohio could do neither. *Amici curiae* vigorously disagree with that judgment and ask that it be reversed.

The need for review of both questions is particularly acute. Since Ohio passed Sub. H.B. 135 in 1995, which restricts the use of the "dilation and extraction" abortion technique,[2] more than one-third of the States have

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[1] Counsel for the *amici* authored the brief in whole. No person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of the brief. This brief is filed with the consent of the parties. Letters of consent have been filed with the Clerk.

[2] In a report issued by the AMA's Board of Trustees in May 1997 urging passage of the federal "Partial-Birth Abortion Ban Act of 1997," H.R. 1122, as amended, 105th Cong., 1st Sess. (1997), the AMA defined the term "intact dilation and extraction" as "a specific procedure comprised of the following elements: deliberate dilation of the cervix, usually over a sequence of days; instrumental or manual conversion of the fetus to a footling breech; breech extraction of the body

enacted statutes attempting to limit the use of this barbaric procedure,[3] for which there is little or no medical justification,[4] and many other States will be considering such legislation in their current sessions. Later this year, Congress is expected to vote on whether to override President Clinton's veto of H.R. 1122, the "Partial-Birth Abortion Ban Act of 1997." Both Congress and the States need to know whether, and under what circumstances, they may restrict the use of the "intact D & X" abortion

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excepting the head; and partial evacuation of the intracranial contents of the fetus to effect vaginal delivery of a dead but otherwise intact fetus." AMA Bd. of Trustees Report 26-A-97 ("Late-Term Pregnancy Termination Techniques") at 15.

[3] 1997 Ala. Act 485 (to be codified at Ala. Code § 13A-13-40 *et seq.*); Alaska Stat. § 18.16.050 (Michie Supp. 1997); Ariz. Rev. Stat. Ann. § 13-3603.01 (West Supp. 1997); 1997 Ark. Acts 984; Ga. Code Ann. § 16-12-144 (Supp. 1997); 1997 Ill. Laws 90-560; Ind. Code Ann. §§ 16-18-2-267.5, 16-34-2-1(b) (Michie Supp. 1997); 1997 La. Acts 906 (to be codified at La. Rev. Stat. Ann. §§ 14:32:9, 40:1299.35.3); Mich. Comp. Laws Ann. §§ 333.16221(m), 333.16226, 333.17016, 333.17516 (West Supp. 1997); Miss. Code Ann. § 41-41-73 (Supp. 1997); Mont. Code Ann. § 50-20-401 (1997); Neb. Rev. Stat. §§ 28-325, 28-326(9), 71-148 (Supp. 1997); 1997 N.J. Acts 262; Ohio Rev. Code Ann. § 2919.15 (Anderson 1996); R.I. Gen. Laws § 23-4.12-1 *et seq.* (Supp. 1997); S.C. Code Ann. § 44-41-85 (Law. Co-op. Supp. 1997); S.D. Codified Laws § 34-23A-27 *et seq.* (Michie Supp. 1997); Tenn. Code Ann. § 39-15-209 (1997); Utah Code Ann. § 76-7.310.5 (Supp. 1997).

[4] Noting that "there does not appear to be any identified situation in which the intact D & X is the only appropriate procedure to induce abortion," the AMA's Report on "Late-Term Pregnancy Termination Techniques" recommended that "the procedure not be used unless alternative procedures pose materially greater risk to the woman." AMA Bd. of Trustees Report 26-A-97 at 15. Section 2919.15 essentially embodies this recommendation.

technique. The definitive answer to that question can be provided only by this Court.

There is also a pressing need for this Court to determine whether the States may limit post-viability abortions to serious physical health reasons. Three-fourths of the States have enacted statutes attempting to restrict the reasons for which abortions may be performed late in pregnancy. Twenty States permit post-viability abortions to preserve the life or health of the pregnant woman, but do not define what the term "health" means.[5] Seven States expressly allow late-term abortions for mental health reasons, in addition to physical health reasons.[6]

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[5] Ariz. Rev. Stat. Ann. § 36-2301.01(A) (West 1993); Ark. Code Ann. § 20-16-705(a) (Michie 1991); Cal. Health & Safety Code §§ 123405, 123410 (West 1996), as interpreted in 65 Op. Att'y Gen. 261 (April 27, 1982); Conn. Gen. Stat. Ann. § 19a-602 (West 1997); Fla. Stat. Ann. § 390.0111(1) (West Supp. 1998); Ga. Code Ann. § 16-12-141(c) (Supp. 1997); 720 Ill. Comp. Stat. 510/5 (West 1996); Iowa Code Ann. § 707.7 (West Supp. 1997); Ky. Rev. Stat. Ann. § 311.780 (Michie 1995); La. Rev. Stat. Ann. § 40:1299.35.4(A) (West 1992); Me. Rev. Stat. Ann. tit. 22, § 1598 (1992 & Supp. 1997); Mich. Comp. Laws Ann. § 750.14 (West 1991), as construed in *People v. Bricker*, 208 N.W.2d 172, 175-76 (Mich. 1973); Minn. Stat. Ann. § 145.412 subd. 3 (West 1989); Mo. Rev. Stat. § 188.030(1) (West 1996); Mont. Code Ann. § 50-20-109(1)(c) (1997); Neb. Rev. Stat. § 28-329 (1995); Okla. Stat. Ann. tit. 63, § 1-732 (West 1997); S.D. Codified Laws § 34-23A-5 (Michie 1994) (after 24th week); Tenn. Code Ann. § 39-1-201(c)(3) (1997); Wis. Stat. Ann. § 940.15 (West 1996).

[6] Mass. Gen. Laws Ann. ch. 112, § 12M (West 1996) (during or after 24th week) (danger to life or grave impairment of physical or mental health); Nev. Rev. Stat. § 442.250 (Michie 1996) (after 24th week) (same); N.D. Cent. Code § 14-02.1-04(3) (1991) (same); S.C. Code Ann. § 44-41-20(c) (Law. Co-op. 1985) (life or physical or mental health); Tex. Rev. Civ. Stat. Ann. art. 4495b, § 4.011(d)(2) (West Supp. 1998) (prevent death or serious impairment to physical or mental health); Utah Code Ann.

Two States attempt to quantify the degree of risk to the pregnant woman, but do not limit such abortions to physical health reasons.[7] Five States purport to forbid abortions late in pregnancy except to save the life of the woman.[8] One State prohibits post-viability abortions except to prevent substantial permanent impairment to the life or physical health of the woman.[9] Finally, three States, including Ohio, have enacted statutes that permit post-viability (or late term) abortions to be performed only where the procedure is necessary to prevent the death of the woman or to prevent substantial and irreversible impairment of a major bodily function.[10]

Notwithstanding this Court's confirmation in *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992), of "the State's power to restrict abortion after fetal viability, if the

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§§ 76-7-302(2), 76-7-302(3) (1995) (after 20th week) (prevent death or grave impairment to health), *see Jane L. v. Bangerter*, 794 F.Supp. 1537, 1544 (D. Utah 1992) (noting legislative intent not to exclude mental health from definition); Va. Code Ann. § 18.2-74(b) (Michie 1996) (prevent death or substantial and irremediable impairment of mental or physical health).

[7] N.C. Gen. Stat. § 14.45.1(b) (1993) (after 20th week) (danger to life or grave impairment of health); Wyo. Stat. Ann. § 35-6-102 (Michie 1997) (imminent peril that substantially endangers life or health).

[8] Del. Code Ann. tit. 24, § 1790(b)(1) (1987) (after 20th week); Idaho Code § 18-608(3) (1997); Kan. Stat. Ann. § 65-6703 (1992); N.Y. Penal Code §§ 125.00, 125.05, 125.45 (McKinney 1987) (after 24th week); R.I. Gen. Laws § 11-23-5 (1994).

[9] Ind. Code Ann. §§ 16-34-2-1(a)(3), 16-34-2-3 (Michie Supp. 1997).

[10] 1997 Ala. Acts. 442 (to be codified at Ala. Code § 13A-13-20 *et seq.*); Ohio Rev. Code Ann. § 2919.17 (Anderson 1996); 18 Pa. Cons. Stat. Ann. § 3211 (West Supp. 1997) (during or after the 24th week).

law contains exceptions for pregnancies which endanger the woman's life or health," the Court has not yet determined the scope of the mandated health exception and has denied review in two cases where that issue could have been considered. *See Ada v. Guam Society of Obstetricians & Gynecologists*, 506 U.S. 1011, 1013 (1992) (Scalia, J., dissenting from the denial of *certiorari*); *Leavitt v. Jane L.*, 117 S.Ct. 2453 (1997). This is an appropriate case for the Court to provide guidance to state and federal courts as well as legislators "as they seek to address this subject in conformance with the Constitution." *Casey*, 505 U.S. at 845.

SUMMARY OF ARGUMENT

The first substantive issue presented by Ohio's petition is whether, contrary to this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), a woman has an absolute right "to terminate her pregnancy . . . in whatever way . . . she alone chooses." 410 at 153. Without deciding whether Ohio could restrict the use of the dilation and extraction procedure, as such, the court of appeals determined that the definition of the procedure in § 2919.15(A) failed to distinguish adequately between the dilation and extraction ("D & X") procedure and the dilation and evacuation ("D & E") procedure. A-21-27. As a consequence, "the Act's definition of the prohibited abortion method includes both the D & E and the D & X procedures," and "therefore bans the use of both . . . procedures." A-27. Relying upon this Court's decision in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75-79 (1976), where the Court struck down a ban on the saline amniocentesis abortion method, and employing *Casey's* mode of analysis, the court of appeals held that a ban on the most

commonly used second trimester abortion technique constitutes an "undue burden" on women seeking such abortions and, therefore, is unconstitutional. A-27-29.

Without addressing the court of appeals' analysis of the scope of § 2919.15(A) or whether the affirmative defense set forth in § 2919.15(C) cures any infirmity found in the prohibition of § 2919.15(B)[11] *amici* submit that the court of appeals exceeded its authority in striking down § 2919.15 in its entirety. Regardless of the ultimate reach of the statute, it is undisputed that § 2919.15 applies to the abortion technique developed by Dr. Haskell, in which a fetus is partially delivered, then deliberately killed immediately before what would otherwise be a live birth.[12] Because that technique is seldom used, a ban on its use cannot be said to constitute an "undue burden" on women seeking second trimester abortions, especially in light of the broad affirmative defense set forth in § 2919.15(C). Any concern that the court of appeals had regarding the scope of the statutory definition could have been fully addressed by crafting an injunction that would have barred defendants from enforcing § 2919.15 against physicians using the more commonly used "D & E" procedure. That would have left the essential core of § 2919.15 intact. In failing to limit its ruling to the unconstitutional application of the statute (an "application" which the legislature never intended), the court of appeals violated the well-established principle " 'that a

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[11] *Amici* generally adopt petitioners' arguments on these points.

[12] Public awareness of the "D & X" procedure and the use of the term "dilation and extraction" originally came from a paper presented by Dr. Haskell at a National Abortion Federation Risk Management Seminar in 1992. *See* A-22 n.8.

federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it.' " *Dalton v. Little Rock Family Planning Services*, 116 S.Ct. 1063, 1064 (1996) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985)).

The second substantive issue presented by Ohio's petition is whether the States' authority to prohibit nontherapeutic, post-viability abortions is real or illusory. In *Roe v. Wade*, 410 U.S. 113 (1973), this Court held that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. at 164-65.

In its alternative holding striking down Ohio's prohibition of most post-viability abortions (Ohio Rev. Code Ann. § 2919.17), the court of appeals held that Ohio may not limit post-viability abortions to physical health reasons, but must include mental health reasons, also. A-37-45. That holding was based upon a misreading of this Court's opinion in *Doe v. Bolton*, 410 U.S. 179 (1973), the companion case to *Roe v. Wade*. In *Bolton*, the Court held that in determining whether an abortion is "necessary," a physician may consider "all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient. All these factors may relate to health." 410 U.S. at 192. Contrary to the court of appeals' understanding (A-45-46), *Doe v. Bolton* did not attempt to set the boundaries of the post-viability health exception mandated by *Roe v. Wade*, but rather resolved a vagueness issue in an abortion statute that applied throughout pregnancy.

Any doubt of Ohio's authority to limit post-viability abortions to serious physical health reasons is laid to rest by this Court's opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), where the Court upheld the "medical emergency" definition in the Pennsylvania Abortion Control Act. *Casey*, 505 U.S. at 879-80. In *Casey*, the Court held that Pennsylvania could require women and minors to comply with the informed consent, parental consent and waiting period requirements of Pennsylvania law, even though the resulting delay might result in some non-permanent major or permanent minor loss of bodily function. If the State is not required to carve out exceptions for these risks *before* viability, when it has *no* authority to proscribe abortion, then it should not be required to provide exceptions for these risks *after* viability, when it clearly *does* have such authority.

ARGUMENT

I. THE COURT SHOULD REVIEW THE SIXTH CIRCUIT'S JUDGMENT STRIKING DOWN OHIO'S RESTRICTIONS ON THE USE OF THE DILATION AND EXTRACTION ABORTION TECHNIQUE BECAUSE THE COURT OF APPEALS FAILED TO GIVE EFFECT TO THE CONSTITUTIONAL APPLICATIONS OF THE STATUTE.

Without deciding whether Ohio could restrict the use of the dilation and extraction abortion method, the court of appeals determined that the statutory definition of the procedure (§ 2919.15(A)) encompassed both the dilation and extraction ("D & X") procedure and the dilation and evacuation ("D & E") procedure. A-21-27. Because the "D & E" procedure is the most commonly used technique for early and mid-second trimester abortions, the court held that a ban on its use, even subject to the broad affirmative

defense provided in § 2919.15(B) created an "undue burden" on women seeking second trimester abortions and, therefore, was unconstitutional under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). A-27-29.

Amici agree with petitioners that the lower court misread the statutory definition, applied an incorrect standard of review and failed to give proper weight to the affirmative defense. But in addition to these errors in analysis, it is clear that the court overreached its authority in not giving effect to the constitutional applications of the statute, as required by Ohio law. That in itself requires reversal. *See Leavitt v. Jane L.*, 116 S.Ct. 2068 (1996).

Under Ohio law, "[i]f any provisions of a section of the Revised Code *or the application thereof to any person or circumstance* is held invalid, the invalidity does not affect other provisions *or applications of the section or related sections* which can be given effect without the invalid provision *or application*, and to this end the provisions are severable." Ohio Rev. Code Ann. § 1.50 (Anderson 1990) (emphasis added). Ohio mandates severance of invalid *applications*, as well as invalid *provisions*, of state law.[13] Severance is appropriate where it will not "fundamentally disrupt the statutory scheme of which the unconstitutional provision is a part." *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369, 377 (Ohio 1994). It would be difficult to conclude that enjoining defendants from

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[13] In light of this general provision, the lack of specific severability language in Sub. H.B. 135 does not preclude severance. *See Papa Nick's Specialties, Inc. v. Harrod*, 747 F.Supp. 1240, 1242-43 (N.D. Ohio 1990).

enforcing § 2919.15 against physicians using the conventional "D & E" abortion technique would "fundamentally disrupt the statutory scheme" when it was never the intent of the Ohio General Assembly to restrict the use of that technique. Accordingly, if there was any question regarding the scope of § 2919.15(A), the court of appeals should have entered a limited injunction preventing defendants from applying § 2919.15 to physicians performing "D & E" abortions. That would have honored Ohio's statutory preference for severance of invalid applications and would have allowed the law to be enforced in its (intended) constitutional applications.[14]

Enjoining only the unconstitutional applications of the statute would not have required the court of appeals to "rewrite the Act." A-32. A more carefully tailored injunction was required by this Court's precedents. Less than two years ago, the Court reaffirmed the principle " 'that a federal court should not extend its invalidation of a statute farther than necessary to dispose of the case before it.' " *Dalton v. Little Rock Family Planning Services*, 116 S.Ct. 1063, 1064 (1996) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985)). In *Brockett*, the Court stated that "the normal rule" is that "partial, rather than facial, invalidation is the required course." 472 U.S. at 504. This is the "required course" not only with respect to severance of unconstitutional *provisions*, but also with respect to unconstitutional *applications*.[15] Although the

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[14] The same error infected the court of appeals' refusal to sever the purportedly invalid *pre*-viability applications of § 2919.15 from the presumptively valid *post*-viability ones. A-30-32.

[15] In *Brockett*, a state obscenity statute prohibiting both protected and unprotected speech was struck down only in its

Court does not "normally grant petitions for certiorari solely to review what purports to be an application of state law," it "undoubtedly should do so where [as here] the alternative is allowing blatant federal-court nullification of state law." *Leavitt v. Jane L.*, 116 S.Ct. 2068, 2072 (1996).

II. THE COURT SHOULD REVIEW THE SIXTH CIRCUIT'S JUDGMENT STRIKING DOWN OHIO'S PROHIBITION OF POST-VIABILITY ABORTIONS BECAUSE THE COURT OF APPEALS ERRONEOUSLY HELD THAT OHIO MUST ALLOW SUCH ABORTIONS TO BE PERFORMED FOR MENTAL HEALTH REASONS.

The court of appeals held that Ohio's statute prohibiting post-viability abortions, Ohio Rev. Code Ann. § 2919.17, is unconstitutionally vague because it lacks a *scienter* requirement. A-34-40. The court held further that the statute is unconstitutional because it also lacks a "mental health exception." A-40-49. In this Argument, *amici* will focus on why this Court should review the latter holding.[16]

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invalid applications. 472 U.S. at 501-05. *See also Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) (holding unconstitutional state statute authorizing the use of deadly force against fleeing suspects, not on its face, but insofar as it authorized the use of lethal force against unarmed and nonviolent suspects); *United States v. Grace*, 461 U.S. 171, 175, 183 (1983) (accepting argument that federal statute prohibiting demonstrations on the Supreme Court grounds could not constitutionally be applied to picketing on the public sidewalks surrounding the building while rejecting argument that statute was invalid on its face).

[16] *Amici* adopt petitioners' vagueness argument.

Ohio prohibits a physician from performing an abortion after viability unless he determines, "in good faith and in the exercise of reasonable medical judgment," that the procedure is "necessary to prevent" either "the death of the pregnant woman" or "a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman." Ohio Rev. Code Ann. § 2919.17(A)(1). "Serious risk of the substantial and irreversible impairment of a major bodily function," in turn, is defined as "any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function," including, but not limited to, the conditions of pre-eclampsia, inevitable abortion, premature ruptured membrane, diabetes, and multiple sclerosis. § 2919.16(J). "On its face," this definition "appears to be limited to physical health risks, as opposed to mental health risks," as the court of appeals noted. A-41.

Relying principally upon a misreading of this Court's opinion in *Doe v. Bolton*, 410 U.S. 179 (1973), the court of appeals held that States may not restrict post-viability abortions to physical health reasons, but must include mental health reasons, as well. A-37-45. In *Doe v. Bolton*, the Court held that in determining whether an abortion is "necessary," as that term was used in the Georgia abortion statute, a physician may consider "all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient. All these factors may relate to health." 410 U.S. at 192 (citing *United States v. Vuitch*, 402 U.S. 62 (1971)). The court of appeals interpreted the broad language of *Doe v. Bolton* as limiting the authority of the State, under *Roe v. Wade*, 410

U.S. 113 (1973), to forbid abortions after viability. A-45-46. That interpretation was wrong.

First, in *Casey*, this Court "reaffirm[ed] *Roe's* holding that 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.' " 505 U.S. at 879 (quoting *Roe v. Wade*, 410 U.S. at 164-65). The Court's failure to cite *Bolton* in the context of confirming the State's authority to proscribe post-viability abortions cannot be regarded as inadvertent and indicates that the Court did not regard *Bolton* as defining the health exception which must be allowed for post-viability abortions.

Second, in *Casey*, the Court noted that it is only in "rare circumstances in which the pregnancy is itself a danger to [a woman's] own life or health." 505 U.S. at 851.[17] The Court's awareness that abortions are rarely performed for reasons of life or health[18] indicates that, in

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[17] "Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control," *Casey*, 505 U.S. at 856, and not out of any concern that the pregnancy itself has created a threat to the woman's life or health. *See* Aida Torres and Jacqueline Darroch Forrest, *"Why Do Women Have Abortions?"*, 20 Family Planning Perspectives 169, 170 (Table 1) (July/August 1988).

[18] In its May 1997 Report, the AMA stated: "Although third-trimester abortions can be performed to preserve the life or health of the mother, they are, in fact, generally not necessary for those purposes. Except in extraordinary circumstances, maternal health factors which demand termination of the pregnancy can be accommodated without sacrifice of the fetus,

referring to the post-viability abortions which must be allowed under *Roe v. Wade*, the Court could not have had in mind the completely open-ended language of *Doe v. Bolton*. *See also, id.*, at 856 (viability marks the stage in pregnancy at which the "State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions").

Third, in *Casey*, the Court stated that "[i]n some broad sense it might be said that a woman who fails to act [to obtain an abortion] before viability has consented to the State's intervention on behalf of the developing child." 505 U.S. at 870. The Court's recognition of the State's authority to "interven[e] on behalf of the developing child" after viability cannot be reconciled with the lower court's view that *Doe v. Bolton* in large measure limits the State's power to prohibit post-viability abortions.

Finally, in *Casey*, the Court upheld the definition of "medical emergency" in the Pennsylvania Abortion Control Act. 505 U.S. at 879-80. Under the Act, the presence of a medical emergency excuses compliance with the informed-consent, twenty-four-hour waiting period, and parental-consent provisions of the law. "Medical emergency" is defined as a "condition which . . . so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major

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and the near certainty of the independent viability of the fetus argues for ending the pregnancy by appropriate delivery." Report 26-A-97 at 15.

bodily function." 18 Pa. Cons. Stat. Ann. § 3203 (West Supp. 1997).

The medical emergency definition was challenged as being underinclusive because it purportedly did not include three conditions which could cause severe health risks to the pregnant woman – preeclampsia, inevitable abortion, and premature ruptured membrane. *Casey*, 505 U.S. at 880.[19] The Court noted that "under some circumstances each of these conditions could lead to an illness with substantial and irreversible consequences." *Id.* The Court agreed with the Third Circuit that the phrase "serious risk" in the medical emergency definition should be construed to include such circumstances " 'to assure that compliance with [the State's] abortion regulations would not in any way pose a significant threat to the life or health of a woman.' " *Id.* (quoting *Planned Parenthood v. Casey*, 947 F.2d 682, 701 (3d Cir. 1991)).[20] Having adopted this construction, the Court held that "the medical emergency definition imposes no undue burden on a woman's abortion right." *Id.*

In upholding Pennsylvania's medical emergency definition, the Court essentially determined that Pennsylvania could require women and minors to comply with the

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[19] These conditions, along with diabetes and multiple sclerosis, are specifically included in Ohio's definition of "serious risk of the substantial and irreversible impairment of a major bodily function." Ohio Rev. Code Ann. § 2919.16(J).

[20] As the court of appeals noted, A-42, "the definition in *Casey* was clearly limited to physical health risks," which also reflected the Third Circuit's understanding, *see Planned Parenthood v. Casey*, 947 F.2d at 701 ("[t]he essence of the definition . . . is that it allows a woman and her doctors to forego many of the [Abortion Control] Act's requirements when there is a medical emergency to the woman's physical health").

informed consent, parental consent and waiting period requirements, even though the resulting delay might result in some non-permanent major or permanent minor loss of bodily function.[21] If the State is not required to carve out exceptions for these risks *before* viability, when it has *no* authority to prohibit abortion, then it necessarily follows that the State should not be required to provide exceptions for them *after* viability, when it clearly *does* have such authority. The language in the Ohio statute is indistinguishable from that found in the "medical emergency" definition in the Pennsylvania statute upheld by this Court in *Casey*. *See also* Ohio Sub. H.B. 135, § 4 (adopting this Court's construction of phrase, "serious risk of the substantial and irreversible impairment of a major bodily function").[22]

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[21] "[T]he wording seems to us carefully chosen to prevent negligible risks to life or health or significant risks of only transient health problems from serving as an excuse for noncompliance [with the regulations]. *Planned Parenthood v. Casey*, 947 F.2d at 701.

[22] In *Casey*, plaintiffs argued that the medical emergency definition was too narrow because it foreclosed the possibility of an immediate abortion despite some significant health risks. This Court commented, "If the contention were correct, we would be required to invalidate the restrictive operation of the provision, for the essential holding of *Roe* forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health. 410 U.S. at 164. *See also Harris v. McRae*, 448 U.S. at 316." *Casey*, 505 U.S. at 880. This quote is important for two reasons: First, in discussing the "health" exception, the Court cited *Roe* and *Harris v. McRae*, but not *Doe v. Bolton*. Second, by citing to the portion of *Roe* requiring a health exception in a statute prohibiting post-viability abortions and stating that it would be required to invalidate the "medical emergency" definition if it violated that standard, the Court clearly tested

Prior to *Casey*, three federal courts held or implied that *Doe v. Bolton* limits the authority of the States to prohibit post-viability abortions. *See Margaret S. v. Edwards*, 488 F. Supp. 181, 196 (E.D. La. 1980) (striking down statute prohibiting post-viability abortions unless the procedure was necessary "to prevent the death of the pregnant woman or to prevent permanent impairment to her health"); *Schulte v. Douglas*, 567 F. Supp. 522 (D. Neb. 1981), *aff'd per curiam sub nom. Women's Servs., P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983) (invalidating statute prohibiting abortion after viability unless the procedure was "necessary to preserve the woman from an imminent peril that substantially endangers her life or health"); *American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283, 299 (3d Cir. 1984) (implying that if the State had attempted to prohibit post-viability abortions for psychological or emotional reasons, such a limitation would have been invalid), *aff'd*, 476 U.S. 747 (1986). Each of these opinions, as well as the court of appeals' opinion in this case, misread *Doe*.

At issue in *Doe* was not the authority of a State to prohibit post-viability abortions, which was addressed in *Roe*, but whether what remained of an abortion statute after major portions of it had been struck down could be enforced. In 1968, Georgia enacted an abortion statute

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and upheld the language, "serious risk of substantial and irreversible impairment of a major bodily function," by the very same "health" standard which should be applied in this case. The court of appeals thus erred in distinguishing *Casey* on the apparent assumption that there is a different "health" standard for post-viability prohibitions and pre-viability regulations that only delay abortions. A-41-45.

which prohibited a physician from performing an abortion unless he determined, "based upon his best clinical judgment," that the procedure was "necessary" because:

"(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

"(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or

"(3) The pregnancy resulted from forcible or statutory rape." *Doe v. Bolton*, 410 U.S. at 202 (quoting statute).[23]

The district court held that "the reasons for an abortion may not be proscribed," and struck down the enumerated exceptions as too restrictive. *Doe v. Bolton*, 319 F.Supp. 1048, 1056 (N.D. Ga. 1970). As a result of this decision, a physician could perform an abortion whenever he determined, in his "best clinical judgment," that the procedure was "necessary." *Id.* at 1058. Plaintiffs appealed, claiming "that the word 'necessary' [did] not warn the physician of what conduct is proscribed; that the statute [was] wholly without objective standards and [was] subject to diverse interpretation; and that doctors [would] choose to err on the side of caution and [would] be arbitrary." *Bolton*, 410 U.S. at 191. This Court disagreed:

> The vagueness argument is set at rest by the decision in *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971), where the issue was raised with respect to a . . . statute making abortions criminal "unless the same were done as necessary for

[23] The statute also required the concurrence of two other physicians and the approval of a hospital review committee.

> the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine." That statute has been construed to bear upon psychological as well as physical well-being. This being so, [we] concluded that the term "health" presented no problem of vagueness. "Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." *Id.* at 72. This conclusion is equally applicable here. Whether . . . "an abortion is necessary" is a professional judgment that the . . . physician will be called upon to make routinely.
>
> We agree with the District Court . . . that the medical judgment may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient. All these factors may relate to health.

Id. at 191-92.

A careful reading of *Doe v. Bolton* reveals that the Court was concerned with resolving a vagueness problem in an exception to an abortion prohibition which applied throughout pregnancy, not with defining the nature of the post-viability health exception mandated by *Roe v. Wade*. The court of appeals' judgment that *Doe v. Bolton* limits the authority of the States to prohibit post-viability abortions and mandates a mental health exception was wrong and should be reversed.[24]

[24] The court's assumption that "the problems associated with a mental health exception" could be avoided by limiting such an exception to "severe irreversible risks of mental and emotional harm," A-49, cannot be reconciled with the broad and

CONCLUSION

For the foregoing reasons, *amici curiae*, a majority of the Members of the Ohio General Assembly, respectfully request that the petition for *certiorari* be granted.

Respectfully submitted,

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open-ended language of *Doe v. Bolton*, 410 U.S. 191-92, as the district court noted in *Margaret S. v. Edwards*, 488 F.Supp. 181, 196 (E.D. La. 1980). The experience of the only State that ever attempted to restrict mental health abortions by strictly defining a standard for approving such abortions suggests that the lower court's confidence that a carefully drafted mental health exception would not be abused is unwarranted.

In 1967, California enacted its "Therapeutic Abortion Act." Under the Act, a woman could not obtain an abortion for mental health reasons unless she proved to the satisfaction of a committee of physicians that she was a danger to herself or to others. Cal. Health & Safety Code § 123415 (West 1996) (the standard for civil commitment). Despite the fact that pregnancy is a normal condition, 61,572 abortions were performed in California in 1970 (98.2% of all abortions) on grounds of "mental health." *See People v. Barksdale*, 503 P.2d 257, 265 (Cal. 1972). An exception that has no measurable boundaries is not an exception – it is the rule.

No. 97-934

In The

Supreme Court of the United States

October Term, 1997

GEORGE VOINOVICH, et al.,

Petitioners,

v.

WOMEN'S MEDICAL PROFESSIONAL CORP., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE STATES OF ARIZONA, ALABAMA, CALIFORNIA, GEORGIA, IDAHO, ILLINOIS, LOUISIANA, MISSISSIPPI, NEBRASKA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE STATES

Amici States are interested in protecting potential life by regulating abortions within the parameters of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Several States, including Ohio and a number of the amici States, have attempted carefully – and democratically – to effectuate that interest by regulating the rarely used, late-term abortion procedure known as Dilation and Extraction (D&X)[1] or "partial-birth" abortion[2] or

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[1] The D&X procedure is typically used late in the second trimester, between the twentieth and twenty-fourth week of pregnancy. *Women's Medical Professional Corporation v. Voinovich*, 130 F.3d 187, 212 (6th Cir. 1997); A-22-23. The cervix is dilated for two days and on the third day, the doctor removes, intact, all but the head of the fetus from the vagina, and then, the doctor forces scissors into the base of the skull, places a suction catheter into the scissor hole, and evacuates the skull contents. *Id.* The American Medical Association has recently concluded that the partial-birth method for aborting a fetus "is never the only appropriate procedure and has no history in peer reviewed medical literature or in accepted medical practice development." A-59 (Boggs, J., dissenting) (quoting AMA Board of Trustees Statement of May 19, 1997).

[2] The nineteen states with partial-birth abortion statutes include 1997 Ala. Acts 485; Alaska Stat. § 18.16.050; Ariz. Rev. Stat. Ann. § 13-3603.01; 1997 Ark. Acts 984; Ga. Code Ann. § 16-12-144; 720 Ill. Comp. Stat. Ann. §§ 513/1 through 513/20; Ind. Code Ann. § 16-18-2-267.5 and 16-34-2-1(b); 1997 La. Acts 906, La. Rev. Stat. Ann. §§ 14:32.9 and 40:1299.35.3; Mich. Comp. Laws Ann. §§ 333.16221(l) & (m), 333.16226, 333.17016, and 333.17516; Miss. Code Ann. § 41-41-73; Mont. Code Ann. 50-20-401; Neb. Rev. Stat. §§ 28-325, 28-326(9) and 71-148; N.J. Stat. Ann. §§ 2A:65A-5 through 2A:65A-7; Ohio Rev. Code Ann. § 2919.15; R.I. Gen. Laws §§ 23-4.12-1 through 23-4.12-6; S.C. Code Ann. § 44-41-85; S.D. Codified Laws §§ 34-23A-27 to -33; Tenn. Code Ann. § 39-15-209; Utah Code Ann. § 76-7-310.5.

by limiting post-viability abortions.[3] Other States, also including a number of amici, are considering such enactments.

The States' ability to regulate in this area of vital interest is stymied, however, by the decision of the court of appeals in this case, and by district court decisions[4] that strike down such "partial-birth" legislation facially by accepting the invitation of the challengers to the legislation to construe it so as to ensure a finding of unconstitutionality rather than accepting the State's proffered constitutional construction. Given the already difficult task of determining the scope of permissible abortion

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Thirteen of these states join this Brief for purposes of urging the Court to hear this case.

[3] States which regulate post-viability or third trimester abortions include 1997 Ala. Acts 442; Ariz. Rev. Stat. Ann. § 36-2301.01(A); Ark. Code Ann. § 20-16-705; Cal. Health & Safety Code §§ 123405, 123410, 123415, 123435; Conn. Gen. Stat. Ann. § 19a-602(b); D.C. Code § 22-201; Del. Code Ann. tit. 24, § 1790(a)(1) & (b)(1); Fla. Stat. Ann. § 390.0111(1) & (4); Ga. Code Ann. § 16-12-141(c); Idaho Code § 18-608(3); 720 Ill. Comp. Stat. Ann. § 510/5; Ind. Code Ann. §§ 16-34-2-1(a)(3) and 16-34-2-3; Iowa Code Ann. § 707.7; Kan. Stat. Ann. § 65-6703; Ky. Rev. Stat. Ann. § 311.780; La. Rev. Stat. Ann. § 40:1299.35.4; Me. Rev. Stat. Ann. tit. 22, § 1598; Minn. Stat. Ann. § 145.412(3); Mo. Ann. Stat. § 188.030(1); Mont. Code Ann. § 50-20-109(c); Neb. Rev. Stat. § 28-329; N.Y. Penal Law §§ 125.00, 125.05 and 125.45; N.C. Gen. Stat. § 14-45.1; Ohio Rev. Code Ann. § 2919.17; Okla. Stat. Ann. tit. 63, § 1-732; 18 Pa. Cons. Stat. Ann. § 3210; R.I. Gen. Laws § 11-23-5; S.D. Codified Laws § 34-23A-5; Tenn. Code Ann. § 39-15-201(c)(3); Wis. Stat. Ann. § 940.15; Wyo. Stat. Ann. § 35-6-102.

[4] *See, e.g., Planned Parenthood of Southern Arizona v. Woods*, No. CIV. 97-385-TUC-RMB, 1997 WL 679921 (D. Ariz. Oct. 27, 1997); *Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997).

regulation under this Court's decisions, the lower courts' improper application of the standard for facial challenges to abortion regulations renders many State legislatures' task of drafting constitutional language to regulate abortion nearly impossible.[5] Like the dissenting circuit judge in this case, amici States believe that "[this] Court meant what it said in permitting state abortion regulations in certain contexts." A-56. Because the signatory States are vitally interested in knowing and preserving the scope of legitimate State action under *Casey*, these amici join Ohio in urging this Court to grant the Petition for Certiorari in this case.

At minimum, certiorari should be granted to provide States and lower courts much-needed guidance as to the appropriate standard of review in facial challenges to State statutes. Many circuits, as well as members of this Court, have concluded that *Casey* silently overruled *United States v. Salerno*, 481 U.S. 739 (1987), which required plaintiffs in facial challenges to show that "no set of circumstances" exists in which the challenged statute may be constitutionally applied. Instead, a more lenient test has been used, requiring challengers to establish unconstitutionality in only a "large fraction" of cases. Other courts, commentators, and Justices have maintained the continuing vitality of *Salerno*, and indeed, the Court recently has cited *Salerno* approvingly in non-abortion contexts. *Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995). The Sixth Circuit not only joined the side of the

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[5] As cogently noted by Judge Boggs in this case, "any set of words chosen by the Ohio legislature would have been challenged on vagueness grounds." A-60 (Boggs, J., dissenting).

split rejecting *Salerno*, but it also broke new ground by extending the "large fraction" test beyond its "undue burden" roots and applying it in the entirely separate area of vagueness. The States are interested in resolving this confusion and split of authority in the abortion area. The States also are concerned about the trend in some courts to extend this *Casey*-trumps-*Salerno* logic to new areas of the law.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's Decision Widens the Split of Authority on Standards of Review in Abortion and Vagueness Cases.

The Petition in this case compellingly identifies the conflict of authority on the appropriate standard for reviewing a facial challenge to an abortion regulation. The traditional rule for assessing a facial challenge is summarized in *Salerno*, requiring a challenger to "establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745. Additionally, in several abortion decisions, this Court has applied a "no set of circumstances" test in assessing facial challenges to a statute. *See Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Ohio v. Akron Ctr. For Reproductive Health*, 497 U.S. 502, 514 (1990); *see also Webster v. Reproductive Health Serv.*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in the judgment). Without explicitly overruling these cases, *Casey* affirmed the facial invalidation of a spousal notification requirement because the statute would operate as a substantial obstacle to a woman's choice to undergo an abortion in a "large fraction" of the

cases in which the statute was relevant. 505 U.S. at 895. Since *Casey*, several Justices have commented on the need for further review of this issue. *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 116 S. Ct. 1582, 1584-85 (1996) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from denial of certiorari). *But see id.* at 1583 (Stevens, J., concurring in denial of certiorari) (opining that the articulation of the standard for facial challenges in *Salerno* was *dicta* and therefore properly ignored); *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Conner, J., joined by Souter, J., concurring in denial of stay) (indicating that *Salerno* is inconsistent with *Casey*).

The federal courts of appeals also have adopted different positions on whether *Casey* modifies the *Salerno/Rust/Akron* standard. On one hand, two courts of appeals have agreed with the Sixth Circuit's conclusion that *Casey* effectively overrules *Salerno*. *See Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 2453 (1997); *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 14 F.3d 848, 863 n.21 (3d Cir. 1994) (*dicta*).

In contrast to these appellate courts, the Fifth Circuit has concluded that *Casey* did not overrule the traditional rule for assessing facial challenges. *See Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir.) ("we do not interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes"), *cert. denied*, 506 U.S. 1021 (1992); *accord Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1104 (5th Cir.) ("As far as we can tell, the Court appears to be divided 3-3 on the *Salerno-Casey* debate, and it would be ill-advised for us to *assume* that the Court will abandon *Salerno* because three members of the Court now desire

that result"), *cert. denied*, 118 S. Ct. 357 (1997). The Fourth Circuit has gone out of its way to indicate its agreement with the Fifth Circuit that *Salerno* still governs. *See Manning v. Hunt*, 119 F.3d 254, 268-69 n.4 (4th Cir. 1997) ("the reasoning of the Fifth Circuit [regarding this lower-court conflict of authority] appears to be most persuasive") (*dicta*).

The Eighth Circuit is itself split on the issue. One Eighth Circuit panel, uncertain of the effect of *Casey* on the *Salerno* standard, analyzed the challenged abortion statute first under *Salerno* and then as if the *Casey* "large fraction" test replaced *Salerno*. *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 529-30 (8th Cir. 1994). Another Eighth Circuit panel applied the standard in *Casey* to facially invalidate an abortion regulation. *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1582 (1996). This intra-circuit split dramatically demonstrates the extent of the confusion regarding the appropriate standard to be applied after *Casey*.

In addition to the *Salerno/Casey* division of authority, this case reveals another split, which the Sixth Circuit has now widened as well. In assessing facial attacks on allegedly vague statutes, the Supreme Court has stated that it will reject the challenge unless the enactment is "impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). The Sixth Circuit, however, assessed claimants' vagueness challenge to the restrictions on the D&X procedure and post-viability abortions under a different standard: "General standards governing vagueness

challenges suggest that a statute with vagueness problems that could chill constitutional freedoms should be held unconstitutionally vague. [Citations omitted.] Since we have already held that *Salerno* does not apply in the abortion context, it is enough that the statute may be unconstitutionally applied to a large fraction of women for whom the law is relevant." A-39 n.18.

This extension of the *Casey* overbreadth standard to vagueness is contrary to other Supreme Court precedents governing vagueness challenges. *See, e.g., Chapman v. United States*, 500 U.S. 453, 467 (1991) ("vagueness claim[s] must be evaluated as the statute is applied to the facts of [the] case" when "First Amendment freedoms are not infringed by [the statute]"); *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988); *United States v. Powell*, 423 U.S. 87, 92 (1975); *United States v. Mazurie*, 419 U.S. 544, 550 (1975). *But cf. Kolender v. Lawson*, 461 U.S. 352, 358-59 n.8 (1983) (suggesting overbreadth analysis may apply whenever there is any "constitutionally protected conduct" at issue); *Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979). And, the Sixth Circuit approach directly conflicts with *Hoffman Estates*.

In addition, several circuit courts have applied a different standard of review from the one applied by the Sixth Circuit. *See, e.g., United States v. Reed*, 114 F.3d 1067, 1070 (10th Cir. 1997) ("[a] vagueness challenge . . . cannot be aimed at the statute on its face but must be limited to the application of the statute to the particular conduct charged"); *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 684 (2d Cir. 1996) (plaintiffs can only succeed "on a facial vagueness challenge if they could show that the law is impermissibly vague in all of its

applications") (internal quotation omitted); *United States v. A Single Family Residence*, 803 F.2d 625, 630 (11th Cir. 1986) (a facial challenge on vagueness grounds "is a claim that the law is invalid *in toto* – and therefore incapable of any valid application") (internal quotation omitted); *Stoianoff v. Montana*, 695 F.2d 1214, 1220 (9th Cir. 1983) ("All that we must find to sustain the facial constitutionality of the Act is a single clear application of the Act to the appellant."). *Cf. New England Accessories Trade Assn, Inc. v. City of Nashua*, 679 F.2d 1, 5 (lst Cir. 1982) ("unless the enactment implicates constitutionally protected conduct, we can invalidate it only if it is impermissibly vague in all of its applications").

The Sixth Circuit's adoption and extension of the *Casey* standard to strike down the Ohio statute, which could have been construed to avoid constitutional problems, demonstrates the critical need for this Court's review and clarification of the appropriate standard to be applied in abortion and vagueness cases. Without review and clarification, those States in the circuits that have concluded that *Casey* modifies *Salerno* may be effectively precluded from regulating abortions to further their interest in potential life.

II. The Petition Should be Granted to Clarify that States May Regulate Partial-Birth and Post-Viability Abortions.

The significance of the questions presented also warrants review. The Court has not yet considered the validity of limitations on partial-birth abortions. Nor has it

determined whether a mental health exception is constitutionally required when it comes to restrictions on post-viability abortions, or whether, since *Casey*, a law restricting post-viability abortions must include a scienter requirement. And, for six years now, the lower courts have remained uncertain regarding the appropriate standard for reviewing claims such as these.

The Sixth Circuit applied a vagueness standard that seems to guarantee the statute's demise. Relying on *Casey*, the court facially invalidated both pre-and post-viability abortion statutes because the statute *may* be unconstitutionally applied to a large fraction of the women for whom the law is relevant. A-39 n.18. Without this Court's review of this erroneous decision, the democratic efforts of an overwhelming majority of Ohio's citizens to express their collective concerns about partial-birth and post-viability abortions will be nullified. This nullification will not be limited to Ohio, however, as eighteen other States have enacted partial-birth abortion laws,[6] most of which are already under judicial attack, *see, e.g., Planned Parenthood of Southern Arizona v Woods*, No. CIV. 97-385-TUC-RMB, 1997 WL 679921 (D. Ariz. Oct. 27, 1997), *Carhart v. Stenberg*, 972 F. Supp. 507 (D. Neb. 1997), *Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997), and many, if not all, of which are vulnerable under the analysis adopted by the Sixth Circuit. Similar problems plague the other State laws that limit post-viability abortions and employ the *Casey*-approved "substantial and irreversible impairment of a major bodily function" language to protect the pregnant woman's health. Moreover,

---

[6] See note 2 *supra*.

the multitude of States that have enacted post-viability laws – including those that do not contain explicit mental health exceptions for the mother – need this Court's guidance on the meaning of the required "health" exception in the context of a ban on post-viability abortions.

A. The Sixth Circuit's Vagueness Standard Renders *Casey*'s Guarantee of the States' Authority to Regulate Abortions Meaningless.

In striking down Ohio's partial-birth abortion law, the majority of the Sixth Circuit panel found that the ban of the D&X procedure encompassed "the more commonly employed D&E [Dilation and Evacuation] procedure and thereby place[d] a substantial obstacle in the path of women seeking pre-viability abortions." A-32. The majority, thus, accepted Plaintiffs' argument that Ohio's statutory definition of the D&X procedure is vague and rejected Defendants' unwavering assertion that the definition of the D&X procedure does not include or describe the D&E procedure. The majority thus "reach[es] out to strike down" the Ohio regulation instead of "interpret[ing] [it] so as to avoid difficult constitutional questions where possible." A-53-54 (Boggs, J., dissenting).[7] As noted by the dissent, the majority's application of the rules of construction is contrary to this Court's authority. *See, e.g., Arizonans for Official English v. Arizona*, 117 U.S.

[7] The Sixth Circuit's rationale differed from that of the district court's in that the Sixth Circuit did not find that a narrowly construed D&X procedure, which excluded the D&E procedure, would be nonetheless unconstitutional. A-20.

1055, 1074 (1997); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 647 (1990).

Moreover, applying a relaxed vagueness standard to facial challenges of abortion regulations allows a court to strike down a statute before a State has the opportunity to implement it and apply it constitutionally. Such a standard readily invites challenges because "words can always be said to be ambiguous." A-59 (Boggs, J., dissenting). This is especially true in the area of abortion regulation where the legislature must attempt to combine medical and legal terminology and where plaintiffs will "challenge any set of words chosen by the Ohio legislature." *Id.*; *see also Evans v. Kelley*, 977 F. Supp. 1306 (court found Michigan's partial-birth abortion law unconstitutionally vague because the term "partially vaginally delivers a living fetus" covers "the partial removal of a fetus while its heart is still beating, whether in whole or in part, [and thus] could outlaw conventional dilation and evacuation procedures in which the fetus is evacuated part by part, as well as intact D&E procedures"); *Planned Parenthood v. Woods*, 1997 WL 679921, at *10-11 (court found Arizona partial-birth abortion law unconstitutionally vague because the term "partially vaginally delivers a living fetus" could be interpreted to include D&E and induction procedures). Given the legislature's use of the term "D&X procedure," the medical community's understanding of that term, the lack of any legislative intent to restrict the D&E procedure, and the Defendants' position that the definition of the D&X procedure did not include the D&E procedure, the Sixth Circuit erred in finding the term vague. This Court should grant review to put a stop to the futile game that

many State legislatures are forced to play in an effort to find judicially acceptable language to restrict the rarely used, unnecessarily cruel abortion procedure, commonly known as partial-birth abortion.

The Sixth Circuit also erred in facially invalidating Ohio's post-viability abortion regulations on vagueness grounds. The court erred in concluding that Ohio's requirement that physicians act in good faith and exercise reasonable medical judgment in determining the viability of a fetus and in making a finding of medical necessity before aborting a viable fetus is unconstitutionally vague because the statute lacks a scienter requirement.[8]

In *Colautti*, this Court specifically declined to decide whether "under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability." 439 U.S. at 396. *Colautti* simply held that a scienter requirement can mitigate the vagueness of an otherwise vague law. Ohio's requirement that a physician exercise reasonable medical judgment is sufficiently clear "to afford a practical guide to permissible conduct." *United States v. Ragen*, 314 U.S. 513, 523 (1942). Moreover, such a requirement may be appropriately applied to medical decisions. *See Casey*, 505 U.S. at 879 (the "life or health of the mother" exception may be invoked only when necessary in appropriate medical judgment).

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[8] The Sixth Circuit need not have reached this issue because the Ohio law does have a scienter requirement. *See* Petition at 24-25.

The Sixth Circuit decision here seriously undermines this Court's holding in *Casey* that permits the States to regulate abortions. Unless the Court grants review, many States' desire to so regulate will be thwarted.

B. The Court of Appeals Erred in Concluding that Ohio's Post-Viability Abortion Regulations are Invalid Because They Do Not Contain a Mental Health Exception.

The court of appeals also erred in concluding that Ohio may not prohibit post-viability abortions unless there is an exception related to the mental health of the pregnant woman. This conclusion is not warranted by this Court's precedents and undermines the States' ability to regulate post-viability abortions.

Ohio's maternal health exception is substantively identical to the maternal health exception upheld in *Casey*. See discussion in Petition at 26. Moreover, neither *Doe v. Bolton*, 410 U.S. 179 (1973) nor *United States v. Vuitch*, 402 U.S. 62 (1971), upon which the court of appeals relied in making its finding, addressed the constitutional requirement for regulation of post-viability abortions. *See* Brief Amicus Curiae of a Majority of Members of the Ohio General Assembly at 19-20 & n.24. The imposition of a broad mental health exception to a prohibition on post-viability abortions could render meaningless the State's compelling interest in protecting fetal life and its right to actually proscribe post-viability abortions. *Id.*

At a minimum, review should be granted to clarify whether this Court requires a mental health exception to prohibitions of post-viability abortions.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

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Commonwealth of Virginia

SUPREME COURT OF THE UNITED STATES

GEORGE V. VOINOVICH, GOVERNOR OF OHIO, ET AL., PETITIONERS *v.* WOMEN'S MEDICAL PROFESSIONAL CORPORATION ET AL.

No. 97–934. Decided March 23, 1998

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

In 1995, the Ohio General Assembly passed, by an overwhelming majority, House Bill 135, which, among other things, places certain restrictions on abortions after fetal viability. To that end, it provides that—

> "(A) No person shall purposely perform or induce or attempt to perform or induce an abortion upon a pregnant woman if the unborn human is viable, unless . . .
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> "(1) The abortion is performed or induced or attempted to be performed or induced by a physician, and that physician determines, in good faith and in the exercise of reasonable medical judgment, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman." Ohio Rev. Code Ann. §2919.17 (1996).

The District Court enjoined the law as unconstitutional on its face, and a divided panel of the United States Court of Appeals for the Sixth Circuit affirmed. 130 F. 3d 187 (1997). The panel majority held that the statute's limitation of postviability abortions is unconstitutionally vague and that it impermissibly lacks an exception for abortions based upon the "mental health" of the mother. Both of these conclusions are unwarranted extensions of our

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precedents. Moreover, reflecting our recent reaffirmation of the principle that a State's interests in restricting abortions are at their strongest after viability, see *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 879 (1992) (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.), over three-quarters of the States have in place statutes limiting the reasons for which abortions may be performed late in pregnancy. The vast majority of those statutes do not contain an explicit mental health exception. I would therefore grant the State's petition for certiorari to decide the constitutionality of House Bill 135's postviability restrictions.

The panel majority first found unconstitutional the Ohio statute's requirement that a physician's determination of medical necessity be made "in good faith and in the exercise of reasonable medical judgment." Ohio Rev. Code Ann. §2919.17(A)(1) (1996).* Relying on our decision in *Colautti* v. *Franklin*, 439 U. S. 379 (1979), the panel held that the "combination of . . . objective and subjective standards without a scienter requirement" renders the medical necessity exception "unconstitutionally vague." 130 F. 3d, at 205. The panel explained that the statute does not "adequately notify a physician that certain conduct is prohibited; rather, a physician may be held criminally and civilly liable for adhering to his or her own best medical judgment." *Id.*, at 206.

This holding is simply not supported by *Colautti*. The statute in that case required physicians to adhere to a standard of care calculated to preserve the life and health

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* If a physician makes such a determination, he must then comply with certain certification requirements, unless he determines, also "in good faith and in the exercise of reasonable medical judgment," that a medical emergency prevents compliance. See Ohio Rev. Code Ann. §2919.17(B)(2) (1996). The panel majority found this requirement unconstitutional as well.

of the fetus if the physician determined that "the fetus is viable" or "*if there is sufficient reason to believe* that the fetus may be viable." *Colautti* v. *Franklin*, *supra*, at 391 (emphasis added; internal quotation marks omitted). Our conclusion that this formulation was void for vagueness in no way suggests that the Ohio statute's more specific language—"in good faith and in the exercise of reasonable medical judgment"—is unconstitutionally vague. The statutory language in *Colautti* was ambiguous because it could be read as imposing either a purely subjective or a mixed subjective and objective mental requirement, thereby leaving physicians uncertain of the relevant legal standard. *Colautii* v. *Franklin*, *supra*, at 391–394. House Bill 135, by contrast, plainly imposes both a subjective and an objective mental requirement, and thus its commands are clear.

The panel majority appears to have been concerned not so much with vagueness, but rather with the statute's lack of a scienter requirement relating to physician determinations about the medical necessity of an abortion. See 130 F. 3d, at 205 (stating that the statute was "especially troublesome" for this reason). Yet as the majority opinion implicitly recognized, see *id.*, at 204–205, we have never held that, in the abortion context, a scienter requirement is mandated by the Constitution. To the contrary, in *Colautti* itself, we explicitly declined to address whether "under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability." See *Colautti* v. *Franklin*, 439 U. S., at 396. We only stated that the vagueness of the statute at issue was "compounded" by the fact that it lacked a scienter requirement. *Id.*, at 394; cf. 130 F. 3d, at 216 (Boggs, J., dissenting) ("[T]he principle invoked by the Court in *Colautti* . . . is . . . not that the absence of a scienter requirement will 'create' vagueness where it does not

otherwise exist."). This Court should grant certiorari rather than allow a constitutional scienter requirement to be imposed under the guise of the void-for-vagueness doctrine.

The panel majority similarly wrenched this Court's prior statements out of context in finding the statute's lack of a mental health exception constitutionally infirm. The panel majority stated that the question of whether a maternal health exception may constitutionally be limited to physical health depends upon what we meant in *Casey* by abortions "'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" 130 F. 3d, at 208 (quoting *Planned Parenthood of Southeastern Pa.* v. *Casey, supra,* at 879). To answer this question, however, the panel relied on our conclusion in *Doe* v. *Bolton,* 410 U. S. 179 (1973), that an exception in Georgia's abortion statute for abortions performed when a physician determined, "'based upon his best clinical judgment[,] [that] an abortion [was] necessary,'" *id.,* at 183, was not unconstitutionally vague because the phrase had been construed to allow physicians to consider "'all factors—physical, *emotional, psychological,* familial, and the woman's age—relevant to the well-being of the patient.'" *Id.,* at 192 (emphasis added). Our conclusion that the statutory phrase at issue in *Doe* was not vague because it included emotional and psychological considerations in no way supports the proposition that, after viability, a mental health exception *is required as a matter of federal constitutional law. Doe* simply did not address that question. As with its void-for-vagueness holding, the panel majority's quarrel with the wishes of the Ohio Legislature on this score appears to be grounded in abortion policy, not constitutional law.

The decision below, moreover, may do more than thwart the will of the Ohio Legislature. The vast majority of the 38 States that have enacted postviability abortion restrictions have not specified whether such abortions must be

permitted on mental health grounds. See Brief for A Majority of Members of the Ohio General Assembly as *Amicus Curiae* 3–4. If the decision below stands, it is likely to create needless uncertainty about the constitutionality of many of those statutes as well. When state statutes on matters of significant public concern have been declared unconstitutional, we have not hesitated to review the decisions in question, even in the absence of a circuit split. See, *e.g., Romer* v. *Evans,* 517 U. S. 620 (1996). This case presents not only this compelling reason for certiorari, but also the ground that our failure to review the decision below may cast unnecessary doubt on the validity of other state statutes. I would grant the State's petition.